Petition

81-1645

No.

Office - Supreme Court, U.S.
FILED
MAR 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner,

v.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

HOWARD J. TRIENENS*
DAVID W. CARPENTER
ELLEN M. BABBITT
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JAMES R. BRYANT, JR.
MICHAEL J. KARSON
ILLINOIS BELL
TELEPHONE COMPANY
225 W. Randolph
Chicago, Illinois 60606
(312) 727-3746

Attorneys for Petitioner

ROBERT D. ALLEN
THOMAS P. HESTER
Of Counsel

* Counsel of Record

QUESTION PRESENTED

Whether a state chancery court may, under the Due Process Clause and decisions of this Court such as *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, be given "discretion" to order an unbonded prejudgment sequestration of $11,500,000 of a class action defendant's assets when there has not been—and could not be—a prior showing of either (1) the defendant's actual or probable liability to the plaintiffs for that amount *or* (2) the plaintiffs' probable inability to collect any judgment ultimately rendered, absent such sequestration order?

RULE 28.1 STATEMENT

Petitioner, Illinois Bell Telephone Company, is a wholly-owned subsidiary of American Telephone and Telegraph Company. Petitioner has no subsidiaries, but is affiliated with Cincinnati Bell, Inc., The Southern New England Telephone Company, and Pacific Telephone and Telegraph Company. American Telephone and Telegraph Company has a number of wholly owned subsidiaries, but these are not petitioner's affiliates within the meaning of Rule 28.1.

TABLE OF CONTENTS

		PAGE
QUESTION PRESENTED		i
RULE 28.1 STATEMENT		ii
TABLE OF AUTHORITIES		iv
OPINIONS BELOW		1
JURISDICTION		2
STATUTES AND CONSTITUTIONAL PROVISIONS		2
STATEMENT OF THE CASE		2
REASONS FOR GRANTING THE WRIT		10
CONCLUSION		16
Appendix A	Opinion of the Illinois Supreme Court in *Getto II*	1a
Appendix B	Order of the Circuit Court of Cook County in *Getto II*	20a
	Transcript of Proceedings In Which the Circuit Court Denied Reconsideration of that Order	24a
Appendix C	Order of the Illinois Supreme Court Denying Rehearing in *Getto II*	29a
Appendix D	Opinion of the Illinois Supreme Court in *Getto I*	30a
Appendix E	Opinion and Order of the Circuit Court of Cook County in *Getto I*	45a
Appendix F	Excerpts from the Relevant Statutory Provisions	59a
Appendix G	Excerpts from Illinois Bell's Petition for Rehearing In The Illinois Supreme Court	62a

TABLE OF AUTHORITIES

Cases

	PAGE
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) .	9
Fuentes v. *Shevin*, 407 U.S. 67 (1972)	10-12
Getto v. *City of Chicago ("Getto II")*, 86 Ill.2d 39, 426 N.E.2d 844 (1981)	*passim*
Getto v. *City of Chicago and People's Gas, Light & Coke Co.*, No. 78 CH 8043 (Circuit Court of Cook County, Illinois)	14
Getto v. *City of Chicago ("Getto I")*, 77 Ill.2d 346, 396 N.E.2d 544 (1979)	*passim*
Grand Bahama Petroleum Co., Ltd. v. *Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978)	11
Great Northern R. Co. v. *Sunburst Oil Co.*, 287 U.S. 358 (1932)	9
Guzman v. *Western State Bank*, 540 F.2d 948 (8th Cir. 1976)	12
Guzman v. *Western State Bank*, 516 F.2d 125 (8th Cir. 1975)	11, 12
Hernandez v. *Danaher*, 405 F. Supp. 757 (1975) (three-judge court), *aff'd mem. sub nom Quern* v. *Hernandez*, 440 U.S. 951 (1979)	11
Illinois Bell Telephone Co. v. *Allphin*, 95 Ill.App.3d 115, 419 N.E.2d 1188 (1981)	15
In re Law Research Services, Inc., 386 F. Supp. 749 (S.D.N.Y. 1974)	12
Keelon v. *Davis*, 475 F. Supp. 204 (N.D. Miss. 1979) ..	12
Mitchell v. *W. T. Grant Co.*, 416 U.S. 600 (1974)	9-11
M P I, Inc. v. *McCullough*, 463 F. Supp. 887 (N.D. Miss. 1978)	12

PAGE

Newton v. *Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973) (three-judge court), *aff'd*, 414 U.S. 1139 (1974) 11

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) 9-12

Sniadach v. *Family Finance Corp.*, 395 U.S. 337 (1969) 10, 11

Union Barge Tire Corp. v. *Marble Cliff Quarries Co.*, 374 F. Supp. 834 (S.D. W. Va., 1974) 11

Woods v. *Tennessee*, 378 F. Supp. 1364 (W.D. Tenn. 1974) (three-judge court) 12

Statutes and Constitutional Provisions

U.S. Const. Amend. XIV, § 1 ..... *passim*

28 U.S.C. § 1257(3) 2, 9

Illinois Revised Statutes:

ch. 11, § 4a 8, 9

ch. 11, § 32 9

ch. 24, § 8-11-2 2

ch. 111 2/3, § 27 14

ch. 111 2/3, § 36(a) 2, 3

Chicago Municipal Code, §§ 132-30 *et seq.* 2, 3

Miscellaneous

R. Stern & E. Gressman, *Supreme Court Practice* (5th Ed. 1978) 9

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner,

v.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

OPINIONS BELOW

The opinions of the Illinois Supreme Court in the decision that petitioner seeks to have reviewed (Appendix A, 1a-19a) are reported at 86 Ill.2d 39 and 426 N.E.2d 844. The order of the Circuit Court of Cook County, Illinois (Appendix B, 20a-23a) and the proceedings in which it refused to reconsider this order (*id.*, 24a-28a) are unreported. The opinions of the Illinois Supreme Court at an earlier stage of this litigation (Appendix D, 30a-44a) are reported at 77 Ill.2d 346 and 396 N.E.2d 544. The opinion and order of the Circuit Court of Cook County (Appendix E, 45a-58a) involving the earlier proceeding is unreported.[1]

[1] The parties below were plaintiff, Charles A. Getto, individually and on behalf of all persons similarly situated, and defendants, the City of Chicago and Illinois Bell Telephone Company.

JURISDICTION

Petitioner seeks review of the judgment of the Supreme Court of Illinois, entered June 4, 1981. Petitioner's timely Petition for Rehearing was denied by the Supreme Court of Illinois on October 19, 1981 (Appendix C, 29a). On January 8, 1982, Justice Stevens granted petitioner an extension of time to file this Petition to and including March 4, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS

U. S. Const. Amend XIV, § 1.

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

The pertinent provisions of Ill.Rev.Stat. ch. 24, § 8-11-2, Ill.Rev.Stat., ch. 111 2/3, § 36(a), and the Chicago Municipal Code, § § 132-30 *et seq.* are set forth at Appendix F, 59a-61a.

STATEMENT OF THE CASE

Petitioner, Illinois Bell Telephone Company ("Illinois Bell"), is engaged in the business of providing telephone service. It is a public utility that recovers its expenses and earns a return on its investment through rates regulated by the Illinois Commerce Commission and the Federal Communications Commission.

In 1955, the Illinois General Assembly enacted a statute authorizing each municipality in Illinois to tax telephone companies on the "gross receipts" from telephone calls originating within its municipal borders. *See* Ill.Rev.Stat. ch. 24, § 8-11-2; 59a. Illinois law provides, however, that whenever a municipality imposes such a "messages tax,"

the telephone customers in that city will bear the economic burden of the tax. *See* 32a, 48a. The Illinois Public Utility Act authorizes telephone companies to recover the messages tax—plus an accounting or collection charge of 3% of the amount of the tax—directly from telephone subscribers. These amounts appear on each telephone subscriber's monthly bill as a separately stated "additional charge."[2] *See* Ill.Rev.Stat., ch. 111 2/3, § 36(a); 59a-60a, *infra*. As to the messages tax, therefore, the utility essentially functions as a conduit between the ratepayers and the City; the utility collects the tax and remits it to the City.

The City of Chicago imposed a messages tax upon Illinois Bell in 1955. Chicago Mun. Code, §§ 132-30 *et seq.* Since this tax was imposed, Illinois Bell has billed and collected both the amount of this tax and the 3% accounting charge from its Chicago customers—through the separately stated "additional charge"—and it has remitted the amount of the tax to the City.

In 1977, the respondent, Charles A. Getto, a Chicago telephone subscriber, filed a class action in the Chancery Division of the Circuit Court of Cook County, Illinois, against both the City of Chicago and Illinois Bell. The suit challenged the method used to compute the amount of the Chicago messages tax and claimed that telephone subscribers had been overcharged because the City had adopted an "expanded interpretation" of "gross receipts."

---

[2] This "additional charge" itself increases a telephone company's gross receipts and could therefore increase its taxes and payments to other governmental bodies. To assure that municipal customers bear the entire economic burden resulting from municipal messages taxes the Illinois law further provides that any increased taxes or payments resulting from the "additional charge" may also be passed directly on to the municipal customers. Ill.Rev.Stat., ch. 111⅔, § 36(a).

Complaint, paras. 9-10. Specifically, the Complaint alleged that the City had erroneously included the "additional charge" in the "gross receipts" base upon which it computed its messages tax and, in effect, had assessed a "tax on a tax." *Ibid.* The Complaint further claimed that Illinois Bell had therefore collected excessive amounts from its customers and had paid excessive taxes to the City of Chicago. The net result, in plaintiff's view, was that the City had been "unjustly enriched" by the excessive tax it received and retained ("excessive tax payments") and that Illinois Bell had been "unjustly enriched" to the extent it retained a 3% accounting cost reimbursement that was based on the excessive tax it collected ("excessive accounting charge"). Complaint, para. 13.

The Circuit Court concluded that the City had unlawfully applied its message tax to the "additional charge." It therefore held that the excessive tax payments resulted "in unjust enrichment to the City" and that the excessive accounting charge resulted in "unjust enrichment to Bell." *See* 55a, Finding 11. Accordingly, after certifying a class of all Chicago telephone subscribers from the ten years prior to the filing of the Complaint, the Circuit Court entered a preliminary injunction ordering Illinois Bell to deposit *future* collections of both the excessive tax payments and the excessive accounting charge in a special protest fund maintained by the City *pendente lite*. The effect of this order was that, during the pendency of the lawsuit, the *City* was denied the use of the excessive tax payments—which otherwise would have been placed in the City's treasury for unrestricted use—and Illinois Bell was denied the use only of the excessive accounting charge.

The Illinois Supreme Court affirmed the Circuit Court's entry of the preliminary injunction in a decision that has been referred to as *Getto I*. *See* 30a-44a. The Supreme

Court held, *inter alia*, "that construing the term 'gross receipts' to include the municipal tax is erroneous." *See* 40a.[3]

Upon the remand of the Illinois Supreme Court's decision in *Getto I*, the trial court granted respondent Getto's motions to make the preliminary injunction permanent and to appoint a trustee to administer the special protest fund. *See* 20a-21a. Then, *on its own motion*, the trial court, on February 13, 1980, ordered *Illinois Bell* to "turn over" to the trustee "as expeditiously as possible" all the "excessive amounts" that Chicago telephone subscribers had paid during the 10 years before the filing of the compiaint. *See* 21a. This amounts to approximately $11.5 million. Virtually all (97%) of this $11.5 million represented the excessive tax payments which Illinois Bell had collected and *remitted to the City*, which the *City* retained, and which the Circuit Court had previously held had "unjustly enriched" the *City*, not Illinois Bell. *See* 55a, Finding 11.

Illinois Bell moved for reconsideration of this order, arguing that there was no basis for holding Illinois Bell liable to the class for amounts which it paid the City and which had unjustly enriched the City, not it. *See* Illinois Bell's Petition To Modify Order of February 13, 1980. The Circuit Court rejected this argument. It held, in accordance with respondent's contentions,[4] that *Illinois Bell's*

[3] The Illinois Supreme Court further held (a) that respondent Getto had standing to bring the action because Illinois Bell was only the nominal payer of the City's messages tax (35a-37a) and (b) that an equity court, rather than the Illinois Commerce Commission, had jurisdiction to hear the case (37a-38a).

[4] Respondent had argued to the Circuit Court that "the additional charges have now been declared to be illegal and BELL is therefore liable for their refund to the persons from whom BELL collected the charges," and "[t]o accede to BELL's suggestion [to the contrary] is to sabotage the thrust of Judge Cohen's judgment order which was affirmed in all respect by the [Illinois] Supreme Court." *See* Supplemental Appendix in Illinois Supreme Court in *Getto II*, pp. 27-28.

liability to the class for the excessive amounts collected over the 10 years before the filing of the suit had been established by the Illinois Supreme Court's decision in *Getto I* and that *Getto I* was *res judicata* on this point. The Circuit Court's order provided that the money Illinois Bell turned over to the trustee was "to be ultimately administered as a refund under the auspices of [the] Court." *See* 21a.[5]

Illinois Bell appealed this order to the Illinois Supreme Court. In addition to arguing, on several different grounds, that a court could not order a refund for the period prior to the filing of the complaint as a matter of law, *see* Appellant's Brief of Illinois Bell, pp. 13-32, Illinois Bell argued that the order that *it* pay the amount of the excessive tax payments must, in any event, be reversed. *Id.* at 37-38; *see also id.* 33-36. The basis for this order had been the Circuit Court's conclusion that *Getto I* established Illinois Bell's liability. Illinois Bell argued that the Circuit Court's holding was erroneous and that the proceedings in *Getto I* established, if anything, precisely the opposite: that the City alone had been unjustly enriched by the excessive tax payments. *Id.* at 37-38. Illinois Bell further argued that if *Getto I* were treated as *res judicata* against Illinois Bell on this point, then it would violate the Due Process Clause of the Fourteenth Amendment because no hearing had been held and no determination whatever of

[5] Although Illinois Bell's liability to the class was treated as established, the Circuit Court stated it was reserving the "ancillary" question whether Illinois Bell might have any recourse against the City for these monies. *See* 28a. The Circuit Court accordingly left Illinois Bell in a position in which it would be forced to pay some $11 million (which had unjustly enriched the City) to telephone subscribers, but would have no recourse against the City if the City were held to have some defense to a claim that it return the excess tax payments it received over the ten years prior to the filing of the complaint.

Illinois Bell's liability for the excessive tax payments had been made. Illinois Bell's Reply Brief, p. 15; *see* Illinois Bell Appellant's Brief, p. 33. Respondent's position on this point was to reiterate that *Getto I* had established Illinois Bell's liability to the class or, alternatively, that Illinois Bell must be held liable to the class for the excessive tax payments. Appellee's Brief of Charles Getto, pp. 29-36, 49-57.

Although it rejected the arguments that an order requiring a refund for the period prior to the filing of the complaint was improper as a matter of law, *see* 7a-14a, the Illinois Supreme Court *agreed* with Illinois Bell's position that *Getto I* had not established Illinois Bell's liability to the class for the excessive tax payments. It explicitly rejected respondent Getto's contrary arguments and the Circuit Court's holding that *Getto I* had established Illinois Bell's liability to the class. *See* 5a-7a, 14a. The Court emphasized that "[n]o determination *whatsoever* has been made as to liability for overcharges." *See* 14a (emphasis added).

However, although the Supreme Court rejected the basis for the Circuit Court's order, it did not vacate the order or remand for further proceedings. Instead, it upheld the Circuit Court's order on the ground that the court had "discretion" to enter it, whether or not Illinois Bell was actually or probably liable to the class for the excessive tax payments. It reasoned that this discretion had not been "abused" because, even though Illinois Bell had not retained the amounts, it had possessed them at one time.

> "Since the plaintiffs paid excess charges directly to Bell, we consider that the court did not abuse its discretion in ordering Bell to deposit the amounts of overcharges with the trustee, excepting those excess charges already deposited with the trustee by the city pursuant to the court's order." 14a.

Two Illinois Supreme Court Justices dissented from the holding that Illinois Bell may be required to pay into the fund the amount of the excessive tax payments that the City had retained. The opinion stated that "[i]f those funds are to be paid into the fund at all, payment should be required from the *city to whom it was paid*," not from Illinois Bell. *See* 18a (emphasis added). The dissenting opinion further stated that to require Illinois Bell to make these payments prior to any determination of liability had "no defensible basis" and posed "substantial due process problems." (*Id.* at 18a-19a.)

In its Petition for Rehearing, Illinois Bell argued that by affirming the trial court's "turn over" order while rejecting the liability rationale upon which that order had been defended and based, the Illinois Supreme Court had converted the turn over order into an unbonded[6] prejudgment sequestration. *See* Illinois Bell's Petition For Rehearing, pp. 5-9; Appendix G, 62a-66a. Illinois Bell stated that such a sequestration order violates the Due Process Clause of the Fourteenth Amendment because there had been no prior showing *either* of Illinois Bell's probable liability for the "excessive tax payments" *or* of plaintiffs' probable inability to collect any judgment ultimately rendered against Illinois Bell absent an attachment. *Ibid.* Illinois Bell further pointed out that a court sitting in law could not enter such an order and urged that courts sitting

[6] The Circuit Court had not required plaintiffs to post a bond to protect Illinois Bell from losses resulting from the order. This, of course, was because the trial court had not conceived of it as a prejudgment sequestration. Under the Illinois attachment statute —which the Illinois Supreme Court apparently regarded as inapplicable because this is an action in equity—the plaintiff must post a bond or the attachment is invalid. Ill.Rev.Stat., ch. 11, § 4a.

in equity can have no greater authority to do so. *Ibid.*[7] The Illinois Supreme Court denied this Petition for Rehearing without opinion. *See* 29a. The question of the constitutionality of such an "equitable" prejudgment sequestration order is squarely presented by the Illinois Supreme Court's decision and is reviewable under 28 U.S.C. § 1257(3).[8]

---

[7] In this regard, Illinois Bell pointed out that Illinois has an attachment statute, applicable to actions at law, that guarantee defendants a hearing and provide other significant substantive protections. Petition for Rehearing, pp. 6-7. This statute precludes any prejudgment attachments or sequestrations unless (1) "the plaintiff shows by a preponderance of the evidence that a cause for issuance of the writ exists" and (2) "the plaintiff demonstrates to the court the probability that he will ultimately prevail." Ill. Rev. Stat., ch. 11, § 32. The Illinois statute further requires that the plaintiff post a bond to protect the defendant against losses resulting from the attachment or sequestration. *Id.* § 4a.

[8] State court decisions approving prejudgment sequestration orders are "final judgments" under 28 U.S.C. § 1257(3) because federal challenges to such orders would obviously be mooted by further state trial court proceedings. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975). This Court has accordingly reviewed such state court judgments in a number of cases, *e.g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974).

It is also clear that Illinois Bell timely raised its federal claim in the state courts. The Illinois Supreme Court's decision to uphold the turn over order, while rejecting its basis, was totally unexpected and unforeseeable. In such circumstances, a federal challenge is timely raised and preserved for Supreme Court review where, as here, it is presented for the first time in the petition for rehearing. *See, e.g., Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-67 (1932); R. Stern & E. Gressman, Supreme Court Practice, § 3.27, at 220-21 (5th Ed. 1978). Here, furthermore, Illinois Bell had raised related due process issues prior to its petition for rehearing. As noted above, its initial briefs in the Illinois Supreme Court had challenged the Circuit Court's holding that *Getto I* established its liability to the class for the excessive tax payments on the due process ground that there had never been a hearing on this issue.

REASONS FOR GRANTING THE WRIT

The question presented in this case is whether state chancery courts may constitutionally be vested with "discretion" to order the sequestration, pending final judgment, of millions of dollars of a class action defendant's assets where there has been no showing by the plaintiff of either (1) the defendant's actual or probable liability to the plaintiffs for those amounts or (2) the need to attach *any* assets to secure the plaintiffs' claim against that defendant. The Illinois Supreme Court's resolution of this question is flatly contrary to a long line of recent decisions of both this Court and other federal courts. The question whether these principles apply to courts in equity possesses great national importance, particularly for defendants in class actions whose businesses will be severely disrupted if they are denied the use of assets pending final judgment in such suits.

This Court has repeatedly recognized that states cannot, consistent with Due Process, have unbridled discretion to deprive a defendant of the use of substantial assets during the pendency of a lawsuit. *See North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). The Court has acknowledged, to be sure, that plaintiffs have an interest in assuring that a defendant will not remove, encumber, or dispose of the assets that are needed to satisfy the plaintiffs' claim and that prejudgment remedies are appropriate in some circumstances. But this Court has also recognized that a sequestration or attachment order has a severe effect on the defendant—depriving it of the use of assets pending final judgment—and that the defendant must enjoy substantive as well as procedural protections against unnecessary, arbitrary, or unwarranted attachments.

The Due Process Clause's and this Court's accommodation between the competing interests is a simple and straightforward one. First, before there can be a prejudgment sequestration or attachment, the plaintiff must make a showing of the validity or at least the probable validity of the underlying claim against the defendant. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 607 (1975); *Fuentes* v. *Shevin*, 407 U.S. 67, 97 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan J., concurring). The plaintiff must establish "the *probability* that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit." *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 609 (1974) (emphasis added). For unless such a showing is made, the defendant can be denied substantial property rights pending the final judgment when there is no basis whatever for giving the plaintiff a present interest in the defendant's assets during the pendency of the case.

The decisions of federal courts of appeals and the federal district courts uniformly recognize that a sequestration order is invalid unless plaintiff establishes at least the probable validity of his claim against that defendant. *See, e.g., Hernandez* v. *Danaher*, 405 F. Supp. 757, 762 (N.D. Ill. 1975) (three-judge court), *aff'd mem. sub nom Quern* v. *Hernandez*, 440 U.S. 951 (1979); *Guzman* v. *Western State Bank*, 516 F. 2d 125, 130-33 (8th Cir. 1975).[9]

Second, due process requires that, before property may be sequestered, the plaintiff must make a showing that the attachment is reasonably necessary to secure payment of any judgment and that, absent prejudgment sequestration,

---

[9] *See also Grand Bahama Petroleum Co., Ltd.* v. *Canadian Transp. Agencies, Ltd.*, 450 F. Supp. 447, 458 (W.D. Wash. 1978); *Union Barge Tire Corp.* v. *Marble Cliff Quarries Co.*, 374 F. Supp. 834, 838-40 (S.D. W. Va. 1974); *see generally Newton* v. *Burgin*, 363 F. Supp. 782, 786-87 (W.D.N.C. 1973) (three-judge court), *aff'd*, 414 U.S. 1139 (1974).

it is likely that any judgment will be uncollectible. *See Fuentes* v. *Shevin, supra,* 407 U.S. at 93. As Justice Powell has stated, there must be an "initial showing of probable inability to collect the debt absent the issuance of the garnishment." *North Georgia Finishing, Inc.* v. *Di-Chem, Inc., supra,* 419 U.S. at 612 & 612 n.5 (Powell, J., concurring). These statements of principle simply recognize that because the sole permissible reason for a prejudgment attachment is to assure the eventual satisfaction of any judgment, use of the remedy is irrational when there is no showing it is needed for that purpose. Numerous federal appellate and district court decisions have accordingly held that a sequestration order is unconstitutional unless it reasonably appears the plaintiff could not otherwise collect any judgment from that defendant. *See, e.g., Guzman* v. *Western State Bank,* 540 F.2d 948, 952-53 (8th Cir. 1976); *Guzman* v. *Western State Bank,* 516 F.2d 125, 130-33 & n.6 (8th Cir. 1975); *Woods* v. *Tennessee,* 378 F. Supp. 1364, 1366 (W.D. Tenn. 1974) (three-judge court).[10]

The decision below is contrary to these principles. The order requiring Illinois Bell to pay excessive tax payments of over $11 million into a court administered fund prior to any determination of its liability to the class for these monies will absolutely deny Illinois Bell any use of these assets pending the final decision of this case. Yet this unbonded sequestration order was affirmed by the Illinois Supreme Court when there had been no attempt by the plaintiffs to make—and when they could not have made—the preliminary showings required by the Due Process Clause.

---

[10] *See also Keelon* v. *Davis,* 475 F. Supp. 204, 212-13 (N.D. Miss. 1979); *M P I, Inc.* v. *McCullough,* 463 F. Supp. 887, 895-96 (N.D. Miss. 1978); *In re Law Research Services, Inc.,* 386 F. Supp. 749, 752-55 (S.D.N.Y. 1974).

The Illinois Supreme Court decision makes it explicit that there has been no determination, preliminary or otherwise, of Illinois Bell's actual or probable liability to the plaintiff class for the over $11 million of excessive tax payments. These monies had been paid to Illinois Bell by Chicago telephone subscribers and then turned over to the City, which retained them and was, in the Circuit Court's words, unjustly enriched by them. *See* 55a, Finding 11. The Illinois Supreme Court noted the logic of Illinois Bell's argument that the City, and not Illinois Bell, is therefore responsible for all the excessive tax payments. The Court stated, however, that "*no determination whatever* has been made as to liability for overcharges" and that it would be "improper" to make any such determination at this stage. *See* 14a (emphasis added). The Court upheld the sequestration order on the ground that the trial court had equitable "discretion" to sequester Illinois Bell's assets to secure plaintiffs' claim, whether or not Illinois Bell could possibly be held liable to plaintiffs for the excessive tax payments.[11] Thus, this holding, by its own terms, upheld a prejudgment sequestration for which there had been no prior finding of probable liability. As such, it violates Due Process.

The Illinois Supreme Court's determination is a particularly serious violation of the Due Process requirements. Here, the City alone has been unjustly enriched by the excessive tax payments, so the City alone can therefore be

[11] The Illinois Supreme Court's opinion suggests that it believes the existence of the Circuit Court's discretion to sequester Illinois Bell's assets is supported by the fact that Illinois Bell initially collected the excessive tax payments. Any such reasoning misconceives the Due Process Clause, for it requires a showing of probable *liability*. As the Illinois Supreme Court's opinion recognizes, the fact that a defendant at one time possessed monies before turning them over to the ultimate holder of them cannot establish that the defendant is actually or probably liable to those who claim the monies.

held liable to subscribers for these amounts.[12] The sole effect of the Illinois Supreme Court's decision, therefore, is to tie up over $11 million in Illinois Bell's assets pending the final decision of this case where it is clear that a *different defendant,* the City, will be liable to the plaintiffs for the excessive tax payments.[13]

Further, plaintiffs never even attempted to make the second preliminary showing required by Due Process: that they probably will be unable to collect any judgment against Illinois Bell absent the issuance of a sequestration order. It is patent, moreover, that no such showing could be made. There should be no doubt that Illinois Bell's resources are and will continue to be more than adequate to satisfy any judgment that possibly could be entered against it in this case. Particularly because it is a regulated utility, there is no possibility that these assets could be removed to another jurisdiction. *See* Ill.Rev.Stat., ch. 111⅔, § 27 (requiring Illinois Commerce Commission approval before a utility may transfer assets).

The apparent basis for the Illinois Supreme Court's approval of the sequestration order is some notion that the constitutional principles applicable to cases at law and to state attachment statutes do not constrain the "equitable

---

[12] Indeed, this has been the holding of an Illinois court in a companion suit that respondents have brought raising essentially identical claims under another Chicago municipal utility tax. *See Getto* v. *City of Chicago and People's Gas, Light & Coke Co.,* No. 78 CH 8043, Order Entering Summary Judgment Against The City For Excessive Tax Payments (Circuit Court of Cook County, Illinois, September 23, 1980).

[13] Furthermore, quite apart from the fact Illinois Bell cannot be held liable for these monies, there are a host of legal issues that remain to be resolved before *anyone* could be held liable to the class for excessive tax payments over the *ten year period* prior to the filing of the complaint.

discretion" of chancery courts. There simply is no support for any such distinction in the Due Process Clause. Neither the defendant's substantial interest in the use of its property pending final judgment nor the plaintiff's interest in security are any different in equitable actions than in actions at law. The same principles therefore must apply to suits in equity as well as actions at law.

In short, the holding that the trial court here had "discretion" to deprive a defendant of the productive use of over $11 million pending final judgment is quite simply unjustified and unjustifiable. It requires Illinois Bell to divert massive assets from its business of serving the public when there is no reason for this deprivation whatsoever. Because Illinois Bell and other major corporations are routinely made defendants in tax cases and other litigation involving claims for millions or hundreds of millions of dollars, *e.g., Illinois Bell* v. *Allphin*, 95 Ill. App.3d 115, 419 N.E.2d 1188 (1981), the cumulative effect of such sequestration orders, entered by courts in their "discretion," could be to cripple or severely disrupt the business of this country. This Court's many decisions interpreting the Due Process Clause's requirements in this area demonstrate the great national importance of questions relating to whether such attachments are permissible. Because the Illinois Supreme Court's decision is so obviously in conflict with the decisions of this Court, Illinois Bell believes this case is an appropriate one for summary reversal, but that, in any case, this petition should be granted and the case set down for oral argument.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the decision of the Illinois Supreme Court should be summarily reversed. In the alternative, the petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

HOWARD J. TRIENENS*
DAVID W. CARPENTER
ELLEN M. BABBITT
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JAMES R. BRYANT, JR.
MICHAEL J. KARSON
ILLINOIS BELL TELEPHONE COMPANY
225 W. Randolph
Chicago, Illinois 60606
(312) 727-3746
Attorneys for Petitioner

ROBERT D. ALLEN
THOMAS P. HESTER
Of Counsel

March 4, 1982.

---

* Counsel of Record

Appendix

APPENDIX A

No. 53203

IN THE
SUPREME COURT OF ILLINOIS

CHARLES A. GETTO, Appellee,
v.
THE CITY OF CHICAGO *et al*,

Opinion Filed June 4, 1981
Rehearing Denied October 19, 1981

MR. JUSTICE WARD delivered the opinion of the court:

This case presents the second interlocutory appeal filed by the Illinois Bell Telephone Company (Bell) and the city of Chicago arising out of a class action suit brought against both parties in July of 1977 by Charles A. Getto. In this suit, filed on behalf of Getto and all persons similarly situated, the plaintiff challenged the method employed by the defendants in calculating the city's municipal message tax. This ordinance imposed a tax "upon all persons engaged in the business of transmitting messages by means of electricity at the rate of five per cent of the gross receipts from such business" originating within the corporate boundaries of the city of Chicago. In calculating the message tax, the defendants interpreted the term "gross receipts," upon which the tax was based, to include the total amount of income received through customer billing and other customer sources as well as the 5% message tax on these receipts.

This manner of taxation, it was argued, resulted in an illegal "tax on a tax." The burden of the tax was then passed on to Bell's customers pursuant to section 36(a) of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36(a)), which permits utilities subject to a municipal message tax to collect, as an additional charge from their customers, an amount equal to the tax paid or any part of the tax. This section also allows the utility to impose an

additional service charge of 3% of the message tax on each subscriber to cover costs of accounting.

On December 19, 1978, the circuit court of Cook County held that the plaintiff, "for himself and on behalf of all other persons similarly situated," had standing to challenge the validity of the city's message tax; that the court and not the Illinois Commerce Commission had jurisdiction over the parties and subject matter of the case; and that the defendants' interpretation of "gross receipts" resulted in an "additional charge to Bell's customers [which was] unauthorized, illegal, irrational, unreasonably burdensome and oppressive to the plaintiff and the class he represents." Based on this the court allowed the plaintiff to maintain a class action. The court also entered a preliminary injunction ordering Bell to "set aside and segregate" that portion of the message tax receipts which exceeded the authorized 5% rate, as well as that portion of the accounting charge which had been erroneously imposed. As part of its order the court directed that any amount which should erroneously be collected contrary to the injunction should be deposited in a special protest fund to be administered and maintained by the court.

The defendants then filed their first interlocutory appeal in the appellate court under Rule 307(a) (73 Ill. 2d R. 307(a)), and this court granted direct appeal here under Rule 302(b) (73 Ill. 2d R. 302(b)). In *Getto v. City of Chicago* (1979), 77 Ill. 2d 346 (*Getto I*), this court held that since the actual burden of the message tax was borne by Bell's customers, the plaintiff class had standing to bring suit; that considering the limits on the Illinois Commerce Commission's statutory authority to provide an adequate remedy, the plaintiff was not required to exhaust his administrative remedies; that the circuit court and not the Commission had jurisdiction over the dispute; and finally that the defendants' construing the term

"gross receipts" to include the municipal message tax was "erroneous." The portion of the order of the circuit court appealed from was affirmed, and the cause was remanded for further proceedings.

Upon remandment to the circuit court, the plaintiff moved for and was given leave to join 105 additional municipalities and four other telephone companies as parties defendant. The plaintiff also filed six motions with the court requesting that the preliminary injunction issued on December 19, 1978, be made permanent; that the court appoint a trustee to take custody and control of the special protest fund; that a new definition of the class members in the suit, tendered by the plaintiff, be certified by the court; that the city of Chicago and Bell comply with all pending discovery requests; that the court appoint an accounting firm to conduct an audit of all message tax returns filed by Bell with the city since December 1, 1955, which was when the message tax ordinance was enacted; and that the court grant whatever further relief might be appropriate.

Both Bell and the city filed objections to these motions. The plaintiff later withdrew his motion seeking a redefinition and certification of the class and instead maintained that the class as certified by the court in its December 19 order was adequate. Bell filed an objection to this certification of the class.

On February 13, 1980, the circuit court ordered that the defendants be permanently enjoined from collecting that portion of the message tax in excess of the authorized rate; that the class be in effect recertified, thereby overruling Bell's objection; and that all parties comply with pending discovery orders. The court also appointed a trustee and an attorney for the trustee in order to administer the special protest fund. Bell was ordered to turn over to the trustee all overcharges collected under the city's

message tax after July 18, 1967, that had not been previously deposited by the city with the trustee, including Bell's excess collection charges for accounting costs. This order adhered to the definition of the plaintiff class, which included all customers of Bell residing in Chicago and making utility payments since July 18, 1967. The court reserved ruling with respect to the appointment of an accounting firm for the purpose of conducting an audit and also with respect to the certification of subclasses involving the 105 municipalities and four other telephone companies joined as parties defendant. Upon denial of Bell's motion to modify this order, both Bell and the city filed notices of interlocutory appeal (73 Ill. 2d R. 307(a)). Subsequent to these filings the plaintiff and both defendants filed motions for direct appeal to this court which we granted. (73 Ill. 2d R. 302(b).) Briefs *amici curiae* have been filed in behalf of several utilities and municipalities.

The defendants first argue that the court's order allowing what they claim is "retroactive" relief from July 18, 1967, should be reversed. This argument is premised upon the size of the class as defined and certified by the court in its December 19 order and later in its order of February 13. The plaintiff class in these orders was defined as "[a]ll customers of Illinois Bell Telephone Company located or residing, in the City of Chicago, who during the period of ten years next before filing of the complaint herein on July 18, 1977, have paid to Bell a charge for the City's message tax in excess of the 5% rate authorized by law and who have accordingly been overcharged in the collection charge made by Bell during said period."

The defendants argue that between December of 1955 and July of 1977, when Getto filed suit, all utility payments to Bell were made without protest and that thereby any recovery is barred under what is described as the voluntary-payment doctrine. As a result, it is contended

that any recovery should be limited to the excess taxes paid by the plaintiff after the class action was filed in 1977.

The plaintiff, in response to this, first asserts that the issue of class certification was decided in *Getto I* and therefore is *res judicata*. In the alternative, he contends that the voluntary-payment doctrine does not apply since he did not have knowledge of all the necessary facts to support a finding that these prior payments were voluntary. Further he says that such payments were made under compulsion because of the threat of termination of his phone service, which, he argues, would also prevent application of the voluntary-tax-payment doctrine.

We first consider the plaintiff's claim that the question pertaining to the period for the recovery of refunds, that is, the period between July 18, 1967, and July 18, 1977, is *res judicata*. A review of the arguments made in *Getto I* and the opinion show that while the maintenance of the suit as a class action was contested in the trial court, that issue was neither raised nor decided on the appeal. Contrary to the plaintiff's position, that part of *Getto I* which held that the class had standing to file suit did not also affirm the trial court's certification of the class. The interlocutory appeal filed by the defendants challenged only the issuance of the preliminary injunction, and involved the questions of standing and the trial court's authority to exercise jurisdiction in the dispute. In discussing these issues as well as whether the defendants had correctly defined the term "gross receipts," this court did not have to consider the question of whether the class was properly defined and certified.

We are not convinced by the plaintiff's argument that this issue should have been raised on appeal in *Getto I* and that by their failure to do so the defendants are barred from raising the question of retroactive claims for refunds in this appeal. The preliminary injunction issued by the

court granted prospective relief only and did not require, as did the permanent injunction issued after *Getto I*, that excess payments since July 18, 1967, be deposited by Bell in the protest fund. Since the preliminary injunction only prohibited, prospectively, excessive collections by the defendants and did not involve the right to file the retroactive claims as described, the defendants were, of course, not obligated to raise that question in their first interlocutory appeal under Rule 307(a).

Too, the defendants were not entitled to challenge the circuit court's certification of the class when they filed their interlocutory appeal in *Getto I*. Our procedural rules affecting class action suits and interlocutory appeals are patterned on comparable Federal rules. Section 57.3 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 57.3), which closely follows Rule 23(c)(1) of the Federal Rules of Civil Procedure, provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be maintained and describe those whom the court finds to be members of the class. ***" This section also states, however, that "[t]his order may be conditional and may be amended before a decision on the merits." Federal courts, in interpreting procedural rules for class action and interlocutory appeals, have held that a party is not entitled to take an interlocutory appeal from a trial court order defining and certifying the class or from a determination as to whether the suit may or may not proceed as a class aciton since either order is always subject to amendment or modification before a final judgment is entered. See *Gardner v. Westinghouse Broadcasting Co.* (1978), 437 U.S. 478, 57 L. Ed. 2d 364, 98 S. Ct. 2451, and cases cited therein. See also *Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583, 590.

Similarly, there are decisions by Federal courts that

since an order granting or refusing a plaintiff's request to proceed as a class action does not terminate the litigation and has no impact upon the merits of the case, it may not be appealed as a final judgment. See *Coopers & Lybrand v. Livesay* (1978), 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454, and cases cited therein.

As of this stage of the action here, no final order or determination of liability has been made. The proceeding is at the discovery stage. As further evidence is presented, the court, in its discretion, may decide to amend or revise its determination of the class. Given the present posture of the case, the defendants would not have been entitled to challenge the trial court's definition and certification of the class in their interlocutory appeal under Rule 307(a) in *Getto I* and therefore the determination of the issue in this appeal is not barred under the doctrine of *res judicata*.

We turn now to the defendants' claim that payment of retroactive claims would be barred by the voluntary-tax-payment doctrine. This court has held that in the absence of a statute which allows recovery for the payment of those taxes or charges which have been improperly assessed by a municipality or utility, a taxpayer or customer may not recover taxes or fees which have been paid voluntarily. (*Ross v. City of Geneva* (1978), 71 Ill. 2d 27; *Adams v. Jewel Companies, Inc.* (1976), 63 Ill. 2d 336; *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52; *Illinois Glass Co. v. Chicago Telephone Co.* (1908), 234 Ill. 535.) Thus, a party may not recover taxes or charges voluntarily paid unless recovery is authorized by statute. In *Illinois Glass Co. v. Chicago Telephone Co.* (1908), 234 Ill. 535, 541, the voluntary-payment doctrine was rather fully stated:

> "It has been a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by

> the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion."

As has been stated, the defendants argue that since the plaintiff paid his utility bill without any protest until suit was filed in July of 1977, he may not recover funds for any overcharges paid prior to that time. Though payment under protest is the typical means by which a taxpayer signifies his contention that a tax or charge was improper, the absence of such a protest does not, without more, require application of the voluntary-payment doctrine. It must also be shown that the taxpayer plaintiff had knowledge of the facts upon which to frame a protest and also that the payments were not made under duress or compulsion.

The defendants, citing *Illinois Glass*, contend that the plaintiff is charged with knowledge of the message tax ordinance as well as those statutory provisions which allow a utility to pass along this tax to its subscribers by way of an increased charge for service. Bell further points out that this charge appeared separately on each utility bill to subscribers as required under the statute (Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36(a)) and thus no attempt was made to impose the fee upon unknowing subscribers.

Getto's phone bills, which were attached to his complaint, show three separate charges near the bottom of the bill for "U.S. Tax," "State," and "City." The State and city charges are each followed by an asterisk, which, in the lefthand margin of the bill, is explained as "Additional charges due to State and City Taxes." We do not view this purported disclosure of "facts" to be sufficient

to warrant application of the voluntary-payment doctrine as the defendants argue, so as to preclude recovery for the earlier years in question.

Though the charge designated "City" does appear separately on the subscriber's bill, it is not stated which municipal tax is involved, or what portion of the bill is being taxed or that the charge includes a 3% charge on the message tax for costs of accounting. Too, with the information provided by his bill, the subscriber has no way of ascertaining that the message tax, which is passed on to him by Bell, was calculated by Bell by applying the 5% tax to the utility's gross receipts, which not only included customer billings, but other customer receipts and the message tax itself. This method of calculation was struck down as "erroneous" in *Getto I.*

The decision in *Illinois Glass* upon which the defendants importantly rely, rested on clearly distinguishable circumstances. There the Chicago Telephone Company was permitted by an ordinance adopted in 1889 to operate telephone lines for a period of 20 years within the corporate boundaries of the city of Chicago. The agreement was conditioned upon the company's agreeing not to increase the rates beyond those set out in a rate schedule filed with the city. The rate established for a business phone was $125 per year. The plaintiff entered into a contract with the company for business phone service at the prescribed rate. After several years of acceptable service, technical and mechanical difficulties arose "which made it difficult to carry on a conversation." (*Illinois Glass Co. v. Chicago Telephone Co.* (1908), 234 Ill. 535, 539.) The phone company investigated the difficulty and proposed that it could and would provide improved service but at an additional charge of $50 a year. That would increase the rate to $175 per year. Illinois Glass, after negotiations, finally agreed to the higher rate and continued to pay it for the next five years. It then brought suit to recover the

excess fees paid to the phone company. The court, observing that the contract for phone service was entered into by the plaintiff "deliberately, after negotiations and with full knowledge of all the facts and conditions ***" (234 Ill. 435, 540), held that the voluntary-payment doctrine was applicable.

Here, the utility rates and charges were established by the Illinois Commerce Commission and the city of Chicago, and not through negotiations between Bell and its subscribers. We do not consider that subscribers were here provided with sufficient information or "facts" to determine whether the method of taxation was proper.

Even were it to be held that the plaintiff had sufficient knowledge of all the facts to permit a conclusion that all payments prior to 1977 were voluntary, we judge that the implicit and real threat that phone service would be shut off for nonpayment of charges amounted to compulsion that would forbid application of the voluntary-payment doctrine. This question was addressed in *Ross v. City of Geneva* (1978), 71 Ill. 2d 27. There, the city of Geneva, which operated a publicly owned utility, levied a 10% surcharge on each subscriber's electrical bill to fund the acquiring and maintaining of parking facilities. Though the ordinance authorizing the addition of the surcharge was enacted in 1962, the charge did not appear separately on utility bills until June of 1973 and then only as a miscellaneous charge. The plaintiff filed a suit in July of that year claiming that the surcharge was illegal. The record showed that the city had a policy of terminating the electrical service of subscribers who failed to pay their bills and that there was no administrative provision for payment under protest. In the course of holding that the city was without authority to levy the surcharge, the court reviewed previous decisions which recognized that payments made under protest to avoid "disastrous effects to business" that would result from the termination of an

important service or the revocation of a license to conduct business were involuntary. This court held that "[c]onfronted with the choice of payment of the surcharge or termination of service, plaintiff, in making the payment, acted with prudence and is not barred [by the voluntary-payment doctrine] from recovery of the sums paid." (71 Ill. 2d 27, 33-34.) It was held that the plaintiff could bring a class action to recover all sums paid over the 13-year period involved.

The factor of compulsion and its place in the voluntary-payment doctrine were discussed in *Illinois Glass*. It was observed by the court in 1908:

> "The ancient doctrine of duress of person, and later of goods, has been relaxed, and extended so as to admit of compulsion of business and circumstances, and perhaps a telephone corporation having a system in general operation and connected with customers and other business houses might reasonably influence a business house to make an unwilling payment of an amount illegally demanded, which would make the payment compulsory. The telephone has become an instrument of such necessity in business houses that a denial of its advantages would amount to a destruction of the business." 234 Ill. 535, 541.

The defendants reply by arguing that under General Order 197, section 301(2) of the Illinois Commerce Commission, a privately owned public utility may not interrupt or terminate a subscriber's phone service when the customer has a legitimate dispute as to charges for service. Under this rule, in order to avoid a termination of service, it is said by Bell that the complainant need only pay the undisputed portion of the bill, and future bills, and seek to resolve his dispute with the utility. If the parties cannot resolve the dispute, the customer can then file a complaint with the Commission. Relying upon this general order, the

defendants argue that the plaintiff's phone service could not have been terminated and therefore the earlier utility service payments cannot be called involuntary. We do not consider the contention to be valid. That portion of the message tax in excess of the 5% authorized rate which was challenged in *Getto I* was sanctioned and approved by the Commission itself. This was one ground for this court's holding that it was not necessary for the plaintiff to exhaust his administrative remedies. Any attempt by the plaintiff to follow the procedural requirements in General Order 197 would obviously have been pointless and he would have been exposed to possible termination of service. We judge that the plaintiff is not barred under the voluntary-payment doctrine.

Bell raises an additional argument—that the plaintiff's action is barred under the doctrine of *laches*. As we consider that the plaintiff did not have knowledge of all the facts necessary to make a payment that was voluntary, *laches* is not applicable. See *Ross v. City of Geneva* (1978), 71 Ill. 2d 27, 34, and cases cited therein.

The defendants next argue that the supervision of refunds for excess utility rates or charges comes within the exclusive jurisdiction of the Illinois Commerce Commission. As a result, they contend the trial court's appointment of a special trustee to supervise and administer the protest fund was erroneous and should be set aside. A resembling argument was made in *Getto I* in connection with the defendants' position that a court of equity could not exercise jurisdiction over any dispute concerning a request for refunds arising under sections 36(a) and 76 of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111 2/3, pars. 36(a), 76).

In *Getto I* the court stated that sections 36(a) and 76 of the Public Utilities Act did not provide an adequate remedy to the plaintiff since the Commission, under these provisions, had no authority to enjoin the continued im-

position and collection of the illegal portion of the message tax. The court said that "[u]nder these circumstances *** the circuit court properly exercised jurisdiction in this cause." (77 Ill. 2d 346, 357.) Though acknowledging that the Commission had no power to enjoin imposition of the tax, the defendants contend now that since this court in *Getto I* made it clear how the tax should be computed, the Commission may administer the refunding process.

As stated in *Getto I*, we do not consider that these sections of the Public Utilities Act provide an appropriate and adequate remedial procedure for the plaintiff. Nor are these sections properly applicable at this juncture of the proceeding. Under section 36(a) of the Act, examination of the question of whether rates or charges imposed by a utility are excessive may be had only when the utility files a supplemental schedule with the Commission. Such a schedule declares the new charges as a result of a utility's decision, under section 36(a), to impose an additional charge upon its subscribers to compensate for the tax levied upon the utility by a municipality under the message tax. As of this stage of the proceeding, Bell has filed a new supplemental schedule reflecting our holding in *Getto I* that the manner in which the message tax was computed was erroneous. This schedule has been approved by the Commission. No challenge to this revised schedule has been made by the plaintiff, and as it now reflects the rates and fees which may be legally charged, section 36(a) no longer provides a statutory means to obtain a refund.

The remedy possible under section 76 would not be adequate. Under it, the Commission's authority to determine whether excessive rates or charges have been imposed arises from the filing of a complaint. The complaint in this proceeding, as determined in *Getto I*, was properly filed with the circuit court and not with the Commission. Also,

this section is a limiting one, providing that "[a]ll complaints for the recovery of damages shall be filed with the Commission within one year from the time the produce, commodity or service as to which the complaint is made was furnished or performed ***." Ill. Rev. Stat. 1977, ch. 111 2/3, par. 76.

Bell also argues that the circuit court erred in ordering Bell to turn over to the trustee all overcharges collected by it since July 18, 1967, which have not already been deposited by the city of Chicago in the special protest fund created by order of the circuit court. Bell argues that, since it has already remitted those tax monies to the city, this court should order that the city and not Bell is responsible for all excess payments, including those made beginning in July 1967. That obviously would be improper. No determination whatever has been made as to liability for overcharges. Since the plaintiffs paid excess charges directly to Bell, we consider that the court did not abuse discretion in ordering Bell to deposit the amounts of overcharges with the trustee, excepting those excess charges already deposited with the trustee by the city pursuant to the court's order. This order did not represent any determination of liability by the circuit court.

For the reasons given, the orders of the circuit court of Cook County considered herein are affirmed.

Orders affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE UNDERWOOD, dissenting:

Although the court acknowledged in *Getto I* the "complementary and interlocking nature" (*Getto v. City of Chicago* (1979), 77 Ill. 2d 346, 355) of the municipal message tax and the plaintiff's offsetting payments to Bell pursuant to section 36(a) of the Public Utilities Act (Ill.

Rev. Stat. 1977, ch. 111 2/3, par. 3[illegible](a)), the majority is here led to what seems to me the incongruous result of requiring Bell to pay over to the trustee money which was paid to it without objection between July 18, 1967, and July 18, 1977, despite the fact that this money was remitted to the city in the form of message tax at the time it was originally collected. This result is accomplished by ignoring *Adams v. Jewel Companies* (1976), 63 Ill. 2d 336, *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52, and the cases there cited. Those cases indicate that, in the case of similarly related use tax and retailers' occupation tax, one who voluntarily pays excessive tax to a retailer who, in turn, remits the corresponding tax to the taxing body, cannot, in the absence of statute, later recover the excessive tax.

While paying lip service, the majority today effectively abandons the voluntary-payment doctrine stated in *Illinois Glass Co. v. Chicago Telephone Co.* (1908), 234 Ill. 535, 541:

> "It has been a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such complusion."

(*Ross v. City of Geneva* (1978), 71 Ill. 2d 27; *Adams v. Jewel Companies* (1976), 63 Ill. 2d 336; *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52; *Illinois Glass Co. v. Chicago Telephone Co.* (1908), 234 Ill. 535.) First, failure to protest payments voluntarily made during the 10-year period is excused on the ground of lack of knowl-

edge that the amounts had been erroneously computed even though no inquiry had been made and the contents of public records would have disclosed the method of computing the overcharge. Even *Ross v. City of Geneva* (1978), 71 Ill. 2d 27, on which the majority relies, is distinguishable, since there the surcharge complained of was protested as soon as it was shown on the bill as a miscellaneous charge. In the present case payments were made without protest during the 10-year period, despite the fact that the charge was shown on customer bills under the heading "City," with a footnote explaining that it was an additional charge due to city taxes. Second, and more importantly, the majority relies on the possibility that the plaintiff labored under an unrealistic fear of termination of service as sufficient to show that the payments were made under compulsion. The fact is, however, that such termination would have been directly contradictory to the orders of the Illinois Commerce Commission prohibiting termination where liability is disputed. Again, *Ross* is distinguishable, for there the defendant had an established policy of terminating the service of those who refused to pay the challenged surcharge. Fears which the majority imputes to the plaintiff are made no more reasonable by the fact that the commission staff was involved in devising the incorrect method of computing the charge, especially since there is no evidence that plaintiff was ever aware of that involvement. (*Getto v. City of Chicago* (1979), 77 Ill. 2d 346, 360-63) (Underwood, J., dissenting).) If unreasonable beliefs can provide sufficient compulsion to excuse otherwise voluntary payments, the voluntary-payment doctrine no longer exists.

The doctrine of *laches* (*Pyle v. Ferrell* (1958), 12 Ill. 2d 547) would provide a second reason to deny the plaintiff [illegible] concerning amounts collected during the period [illegible]uly 18, 1967, to July 18, 1977. The ordinance imposing the message tax was enacted in 1955, as were pro-

visions corresponding to section 36(a) of the Public Utilities Act. Although any recovery will apparently be limited to the 10-year period preceding filing of the complaint in this case, the erroneous computations of taxes and collection fees had been performed each month for 22 years before plaintiff filed this class action, and the collected taxes were presumably paid to the city by Bell during each of those years. If retroactive recovery is permitted there will be obvious and substantial financial prejudice to the city and the utility, which long ago expended the funds resulting from the now challenged computations.

Having ignored the doctrine of *laches*, and having decided that the voluntary-payment doctrine did not preclude recovery of sums paid prior to July 18, 1977, the majority approves the circuit court's order that Bell deposit with the trustee amounts collected during that period, less whatever amounts had been deposited by the city. Similar action by the appellate court in *Hagerty* was condemned by this court:

"We do not approve the appellate court's statement that:

> 'If defendant collected excess taxes from its customers, it has received and has retained the excess money to which it is not entitled. The fact that defendant may have paid a similar amount of money to the State is of no importance when considering the rights and obligations between defendant and its customers. Any money defendant may have paid to the State was in discharge of its own obligations and does not affect the rights of plaintiff and the class. When defendant retained the tax collected from plaintiff, it was unjustly enriched to the extent to which the tax collected exceeded the amount of tax that it could rightfully collect.' 14 Ill. App. 3d at 43.

> This reasoning misapprehends the interrelation between the use tax and the retailers' occupation tax. (See *Turner v. Wright* (1957), 11 Ill. 2d 161.) If GM erroneously paid a retailers' occupation tax to the State on the same transaction in which it erroneously collected a use tax from the plaintiff, it was not enriched at all, justly or unjustly. If there was unjust enrichment, it was the State that was enriched." *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52, 60.

To date, as the majority acknowledges, "No determination whatever has been made as to liability for overcharges." (86 Ill. 2d at 55.) Bell has admittedly paid to the city all of the collected taxes, retaining only the collection charge provided by section 36 to compensate it for its services in collecting the tax. Under the majority's approach to this case, Bell can rationally be required to pay to the trustee of the fund that portion of its collection charge which had been improperly computed. There is, however, in my judgment, no defensible basis upon which Bell may also be required to pay the trustee the improperly computed amounts of tax which it had already paid to the city during the intervening 10 years. If those funds are to be paid into the fund at all, payment should be required from the city to which it was paid. The ordinance required Bell to pay the collected taxes to the city. It did so for 22 years. Now, it is for the first time claimed that the tax was incorrectly computed, and that both the amount of the city's tax and the amount of Bell's collection fee are higher than authorized. Requiring Bell to pay into the protest fund the disputed portion of its retained fees is one thing, but compelling it, instead of the city to which the taxes have been paid, to pay into the fund the amounts of tax previously remitted to the city during the 10-year interval, is, it seems to me, totally unjustified. That action may well pose substantial due process prob-

lems in addition to being directly contrary to *Adams*, *Hagerty*, and the cases there cited.

Whether the utility's future customers or the city's taxpayers, or both, bear the burden of the 10-year refund which appears to be contemplated by the trial court and a majority of my colleagues depends, of course, on whether the majority will permit Bell to eventually recover its duplicate payment from the city, a question the majority refuses to decide now. This anomalous situation typifies the problems resulting when retroactive recovery is permitted of taxes paid without protest for an entire decade.

I would limit recovery here to post-complaint-filing payments of the overcharges.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX B

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *Plaintiff*, v. CITY OF CHICAGO, a municipal corporation; ILLINOIS BELL TELEPHONE COMPANY, a corporation, et al., *Defendants.*	No. 77 CH 4930

ORDER

This cause coming on to be heard on certain pending motions of plaintiff heretofore presented to the Court on December 10, 1979, objections filed thereto and certain other pending motions of the parties, and the Court hearing the argument of counsel and duly considering the memoranda of law filed by the parties, and the Court being fully informed in the premises;

IT IS *ORDERED*:

1. With respect to plaintiff's motion # 1, the Preliminary Injunction heretofore entered by the Court on December 19, 1978, and affirmed by the Supreme Court on October 19, 1979, is hereby made permanent and defendants CITY OF CHICAGO and ILLINOIS BELL are permanently enjoined from collecting as an additional charge for the City's message tax on gross receipts, any portion thereof which includes the tax on itself.

2. With respect to plaintiff's motion # 2, the Court hereby appoints Michael Shelly as Trustee of the Fund to be ultimately administered as a refund under the auspices of this Court, and Norman Nachman as attorney for said Trustee. The Trustee shall forthwith take control and custody of the Special Protest Fund heretofore created by the Court in its order of December 19, 1978, and the CITY is hereby directed to turn over to said Trustee any and all funds and/or securities heretofore ordered to be sequestered and maintained by the CITY in interest bearing obligations.

It is further ordered that as expeditiously as possible BELL shall turn over to the Trustee that portion of the Fund not previously deposited by the CITY into the Special Protest Fund which represents all monies heretofore collected by ILLINOIS BELL from its customers located in or residing in the CITY OF CHICAGO since July 18, 1967, as overcharges for the City Message Tax in excess of the 5% rate authorized by law and the excessive collection charge made by BELL for its own account, based upon said overcharge.

Within a reasonable time from the appointment of said Trustee, defendant CITY OF CHICAGO shall furnish to the Trustee a detailed accounting of the Special Protest Fund heretofore entrusted to the City's safekeeping and shall report the amount of interest theretofore earned and collected on the funds so deposited with the City and to detail all other matters appropriate to a full and accurate accounting.

All said funds collected by the Trustee shall be sequestered and maintained in interest-bearing obligations having a maturity of at least 90 days and all said securities shall be approved by the Court in advance of purchase. Provision for a fidelity bond, if any, is hereby reserved.

3. The definition and certification of the class as heretofore ordered by the Court in its order of December 19, 1978 shall stand, said definition and certification being as follows:

> *All customers of Illinois Bell Telephone Company located or residing, in the City of Chicago, who, during the period of ten years next before the filing of the complaint herein on July 18, 1977, have paid to Bell a charge for the City's message tax in excess of the 5% rate authorized by law and who have accordingly been overcharged in the collection charge made by Bell during said period.*

The pending motion of ILLINOIS BELL heretofore filed on February 4, 1980 in opposition to certification of the class and proposing an alternate definition of the class is hereby denied.

In due course the parties and the Trustee shall confer and formulate appropriate notice to be furnished to the class heretofore defined and certified. The form and content of such notice, method of distribution and appropriate publication, if any, shall be submitted to the Court for approval.

The Court reserves for later determination par. 3 of plaintiff's Motion No. 3 with respect to the determination of subclasses, if any, as to BELL subscribers residing in municipalities other than the CITY OF CHICAGO.

4. With respect to plaintiff's Motion # 4 the parties are hereby ordered to comply forthwith, with all pending discovery requests heretofore served upon them.

5. With respect to plaintiff's Motion # 5, the Court reserves for later determination the appointment of a reputable accounting firm of Certified Public Accountants to conduct an audit of all message tax returns filed by de-

fendant BELL with the CITY OF CHICAGO since July 1967. The Court also reserves for later determination, the allocation of the expense of said audit as between defendant BELL and the Fund herein created.

6. With respect to plaintiff's Motion # 6, a status hearing is hereby set for April 25, 1980 at 11:00 o'clock A.M. without further notice.

ENTER:

/s/ DONALD O'BRIEN
Judge of the Circuit Court

DATED: February 13, 1980.

SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

LEONARD E. HANDMACHER
134 North LaSalle Street
Chicago, Illinois 60602
(312) 332-4222
Attorneys for Plaintiff

STATE OF ILLINOIS }
COUNTY OF COOK } SS:

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *Plaintiffs,* v. CITY OF CHICAGO, a municipal corporation; ILLINOIS BELL TELEPHONE COMPANY, a corporation, et al., *Defendants.*	No. 77 CH 4930

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable Donald J. O'Brien, Judge of said Court, on the 10th day of March, 1980, at the hour of 2:00 o'clock p.m.

• • •

THE COURT: All right, I've studied everything, of course, that you fellows have given me, and I've done my own research and reconsiderations and studies.

Is there anything further that you want to say, Mr. Bryant?

MR. BRYANT: No, except that I would like to adopt the objections on the Commonwealth Edison-Mekis (phonetic) brief. He read the thing, that is my argument.

THE COURT: Do you have anything you want to say?

MR. KARASIK: I'll stand by my response.

• • •

THE COURT: . . .

Well, I'll start out with the Commonwealth Edison brief.

It has no application to the question that is before me. I thought I'd like to file it just to see what's in it, but it's way off the beat.

And, the question that's before me today, much argument is made by Bell here that certain things were not determined by Judge Cohen or by the Supreme Court.

We have to go back to the fundamental issue that the Supreme Court had before it, and that was precipitated by Motions to Dismiss by Bell and by the City, but are alleged to be Class Actions.

Judge Cohen, in his order, after much consideration, I'm sure, of the briefs and the arguments, denied the Motions to Dismiss, certified it as a Class Action, and entered the order; findings which are self-explanatory.

That order was appealed. Specific questions were brought out in the Opinion by the Supreme Court, but the fundamental question that has to underlie the action of the Supreme Court was the ruling on the Motion to Dismiss.

The Supreme Court was satisfied that the Court did not commit any error in denying the Motions to Dismiss, it affirmed his order.

Now, the injunction. I agreed you were not in an interlocutory order for the injunction; but, underlying the validity of the order of the injunction must be a good Complaint. If there was any doubt in the Supreme Court's mind that this was not a good Complaint, in my judgment, if there was any doubt in the Supreme Court's mind that it was not a proper certification of the class, a proper Class Action Complaint, it could not, under any stretch of the imagination, affirm the issuance of the injunction.

The injunction has to rest on a good Complaint. If there isn't a good Complaint, there's no basis for the injunction or for the affirmance of the injunction by the Supreme Court.

Likewise, the Supreme Court—and it's the law as you know it as well as I, that in the issuance of a temporary injunction, the Court has to consider the likelihood of success in the action. That would have had to gone through the minds of the Justices when they sustained the issuance of the injunction.

So, to say that the issue of a Class Action Complaint has not been passed upon, I cannot go along with it. If it hadn't been passed upon, and hadn't been found to be a good Complaint, I'm sure the Court would not have sustained the injunction order and would have reversed it or at least sent it back, remanded it for some further consideration.

So, my decision on this motion has to be deny the Petition that's before me.

However, there is a question that I have in my mind. I would like to resolve it as quickly as I possibly could, and this is, I don't mean by denying the motion at this time to say that the ultimate one responsible for the refund or the recovery of the money is either the City or Bell Telephone, I'm not making that decision at this time.

I do feel, at this stage of the proceedings, however, under the law, that since Bell Telephone was the one who collected it from the customers, it's their obligation to come up with the money. I so said in my order of February 13th.

My making that decision now, however, I am not foreclosing the Bell Telephone Company from seeking the City to reimburse them or fixing the ultimate liability for the

return of the money on someone other than the Bell Telephone Company.

At this stage of the proceedings, however, I feel it's their responsibility, Bell Telephone's responsibility, under the order that was entered by Judge Cohen, under the affirmance of that order in the Supreme Court, and under my present judgment as to who I think is responsible.

Now, let me ask this question. I should like as quickly as possible to have a determination made as to whether the City is going to have to reimburse the telephone company, or whether it's going to be the telephone company's responsibility to pay the money and be the one who has to pay it out of their own coffers.

I'm sure you had something in mind to bring that question to an ultimate decision.

What's your thoughts on that?

MR. BRYANT: Well, I'm not so sure that I have gone to the next step on this, your Honor.

I thought, with all due respect, that the finding of the judgment by Judge Cohen, which this Court has indicated he has affirmed, would only justify, with all due respect, an order against the City of Chicago rather than Illinois Bell, because it's undisputed.

THE COURT: Now, you know that's not going to happen.

MR. BRYANT: It's not going to happen.

I'd like to think about that.

THE COURT: I suppose the City would like to think about it, too.

MR. BRYANT: Submit a counterclaim, counter-complaint, something in that nature, would be one of the things we would take into consideration.

THE COURT: Well, I've been thinking about that question very seriously because that is a serious aspect in this case.

Inasmuch as I know your feelings that you feel you're not responsible for returning this money, presently, I am not going to disturb my original order that you are responsible, without foreclosing an opportunity to go into the subject completely and have it briefed.

However, it's going to be presented, and whether it's presented to me or whether you're going to proceed in some other ancillary litigation—if you want to call it "ancillary" —I don't know whether you want to proceed with this litigation before me or whether you're going to—I suppose you'll almost be compelled to do it here in light of the decision I'm making now and the decision I made February 13th.

MR. BRYANT: That is my present thought, yes, sir.

THE COURT: Draw the order.

MR. BRYANT: The Petition modified is denied.

THE COURT: Yes, sir.

(Which were all the proceedings had in the above-entitled cause on this date.)

APPENDIX C

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 19, 1981

Mr. James R. Bryant, Jr.
Attorney at Law
225 W. Randolph St., S#27A
Chicago, IL 60606

No. 53203—Charles A. Getto, indv., etc., appellee, vs. City of Chicago, a municipal corporation, et al., etc., appellants. Appeal, Circuit Court (Cook).

The Supreme Court today denied the petition for rehearing in the above entitled cause. Mr. Justice Clark took no part.

Very truly yours,

/s/ Clell L. Woods

Clerk of the Supreme Court

APPENDIX D

No. 51581

IN THE
SUPREME COURT OF ILLINOIS

CHARLES A. GETTO, Appellee,

v.

THE CITY OF CHICAGO, Appellant.

Opinion filed October 19, 1979—
Rehearing denied November 30, 1979.

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, Charles A. Getto, "individually and on behalf of all persons similarly situated," filed this action in the circuit court of Cook County against defendants, the city of Chicago and Illinois Bell Telephone Co. (Bell), alleging that defendants had erroneously collected from Bell's customers sums greatly in excess of the amounts due under the defendant city's municipal message tax. On behalf of all Bell customers in the city of Chicago, plaintiff sought a declaratory judgment, a temporary injunction, a permanent injunction, an accounting, a refund of tax moneys, and an award of attorney's fees. The city and Bell filed separate and joint motions to dismiss the complaint; the circuit court denied the motions to dismiss and issued a preliminary injunction directing Bell to segregate and sequester that portion of the message tax alleged by plaintiff to be excessive. Both defendants appealed from the circuit court's interlocutory order (58 Ill. 2d R. 307(a)(1)), and we allowed defendants' motions for direct appeal to this court under Rule 302(b) (58 Ill. 2d R. 302(b)).

There are several issues presented in this appeal, but the controlling question involves the construction of section 8–11–2 of the Illinois Municipal Code (Ill. Rev. Stat. 1977, ch. 24, par. 8–11–2), which in pertinent part provides:

> "The corporate authorities of any municipality may tax any or all of the following occupations or privileges:
>
> 1. Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality.
>
> • • •
>
> For the purpose of the taxes enumerated in this section:
>
> 'Gross receipts' means the consideration received for

> the transmission of messages, *** and for all services rendered in connection therewith valued in money, whether received in money or otherwise, including cash, credit, services and property of every kind and material and for all services rendered therewith, and shall be determined without any deduction on account of the cost of transmitting such messages, without any deduction on account of the cost of the service, product or commodity supplied, the cost of materials used, labor or service cost, or any other expenses whatsoever."

Pursuant to this statutory authority, the city enacted an ordinance which imposed a tax "upon all persons engaged in the business of transmitting messages by means of electricity at the rate of five per cent of the gross receipts from such business [originating within the city of Chicago]." (Chicago Municipal Code sec. 132–31 (1978).) The definition of "gross receipts" in the Chicago Municipal Code (Chicago Municipal Code sec. 132–30 (1978)) is, for our purposes here, identical to the definition contained in the statute.

Section 36(a) of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36(a)) provides:

> "Whenever a municipality pursuant to Section 8–11–2 of the Illinois Municipal Code, as heretofore and hereafter amended, imposes a tax on any public utility, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge. Such utility shall file with the Commission a true and correct copy of the municipal ordinance imposing such tax; and also shall file with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be

made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer. The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission."

The term "gross receipts" upon which the 5% municipal tax is imposed has been construed by defendants to include not only customer billings for the transmission of messages originating within the city, but also all taxes assessed on those billings, including the municipal tax itself. For example, if a customer's pretax monthly bill were $10 (ignoring, for the sake of simplicity, the existence of Federal and State taxes), the amount upon which the municipal tax is imposed would not be $10, but $10.50. This results in a municipal tax of 52½ cents, instead of 50 cents, plus a correspondingly larger amount withheld by Bell for its accounting costs.

Exhibits contained in the record show that, immediately following the enactment of the enabling legislation, representatives of the public utilities operating in Illinois met with personnel of the Illinois Commerce Commission and a formula was approved for the addition of a percentage to be added to the net (pretax) billings "in order for them [the utilities] to retain the same amount of dollars after the municipal tax is applied as before the tax was applied." These percentages, determined by means of an algebraic equation, are added to the billings and passed on to the customers. In this case they equal 6.5% of the

customer's pretax bill.

In his complaint plaintiff alleged that defendant's computation of "gross receipts" to which the tax was applicable did not conform to the statutory definition of "gross receipts"; was capable of being compounded to infinity; was irrational, unreasonably burdensome, and oppressive; and deprived plaintiff of due process. Plaintiff also averred that the Illinois Commerce Commission had no power to adjudicate the validity and constitutionality of an ordinance or statute; that he was without an adequate remedy at law; and that the large number of Bell customers in Chicago, the common questions of law and fact, and the advantages of a single common judgment required that the suit be maintained as a class action. In his prayer for relief plaintiff sought a declaration that the part of the message tax constituting a tax on itself was illegal, invalid, and a violation of due process; he also asked that the circuit court temporarily and permanently enjoin defendants from collecting the alleged excess amounts, or, alternatively, that the court order the money paid into a protest fund, pending the outcome of the cause; that the court order Bell to make a complete accounting of the Chicago message tax collected by it; and that judgment be entered ordering refunds of excessive amounts paid by Bell's Chicago customers.

Bell filed a motion to dismiss, asserting that the municipal tax was an occupational tax on the business of transmitting messages by electricity, and not a tax on the telephone subscribers. The amounts shown as city taxes in its bills, Bell argued, were, therefore, merely part of the total price for telephone service. Since plaintiff's contention was, essentially, that an excessive amount was charged for service, Bell argued, plaintiff was required to seek a remedy before the Illinois Commerce Commission, which has primary jurisdiction over telephone rates. (Ill. Rev. Stat. 1977, ch. 111 2/3, pars. 36, 76.) The city filed a

motion to dismiss, substantially similar to Bell's motion, alleging also that the "taxpayer" was Bell and that the Illinois Commerce Commission was the proper forum in which plaintiff should seek a remedy.

Plaintiff filed a memorandum in opposition to the motions and defendants, upon leave of court, filed a joint motion to dismiss, averring that the factual allegations in plaintiff's complaint failed to state a cause of action and were insufficient to support either a cause of action in the circuit court or a class action, and that the circuit court lacked primary jurisdiction to order refunds of excessive telephone rates. Alternatively, defendants maintained that if the complaint stated a cause of action it was for declaratory judgment rather than equitable relief and the cause should be transferred from the chancery division of the circuit court.

The circuit court, finding that defendants had improperly construed the gross receipts base of the city message tax to include the tax itself, entered an order denying the motions to dismiss the complaint and issued a preliminary injunction. The injunction directed Bell to pay into a special protest fund that portion of the municipal message tax charge which exceeded 5% of "gross receipts" and that part of the additional charge for collection and accounting based on the excessive tax. The court allowed the cause to proceed as a class action and reserved for later consideration the other items of relief sought by plaintiff.

Defendants contend that plaintiff lacked standing to bring this action for the reason that the tax was levied on Bell and that it, and not plaintiff, paid the city message tax; that the "additional charge," if improperly collected, resulted in an excessive telephone rate; that the Illinois Commerce Commission, pursuant to section 36(a) and section 72 of the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111 2/3, pars. 36(a), 76), has primary jurisdiction to order refunds of excessive telephone rates; and that the

proper forum for determining whether the rate was improperly collected is the Illinois Commerce Commission. *Amicus curiae* Commonwealth Edison Company argues that the defendants have correctly construed the statute and that "the legislature intended no deduction for amounts collected on account of the tax itself." It argues, too, that "a tax computed on receipts which include charges made on account of the tax is constitutional."

Amicus curiae People's Gas, Light & Coke Company contends that plaintiff lacks standing to seek an interpretation of the ordinance; that the circuit court "lacks subject matter jurisdiction over plaintiff's claim for refund"; that the complaint fails to state a cause of action; that the General Assembly and the city council "assumed the Illinois Supreme Court's interpretation of 'gross receipts' in enacting the enabling act and ordinance"; that plaintiff is estopped from obtaining retroactive relief; and that his claim is barred by the statute of limitations.

We consider first the question of plaintiff's standing to bring this action. We do not agree with defendants that because plaintiff is not the initial taxpayer he is without standing to challenge the validity of the ordinance. A similar question was involved in *Crane Construction Co. v. Symons Clamp & Manufacturing Co.* (1962), 25 Ill. 2d 521. In *Crane*, plaintiff, the lessee of certain construction equipment, challenged the amendments to the Retailers' Occupation Tax Act and Use Tax Act that made those acts applicable to lease transactions as well as sales (held unconstitutional in *International Business Machines Corp. v. Department of Revenue* (1962), 25 Ill. 2d 503). Like the message tax in the present cause, the retailers' occupation tax (Ill. Rev. Stat. 1977, ch. 120, par. 440 *et seq.*) was levied upon those engaged in particular occupations. Similarly, an accompanying use tax authorized the nominal taxpayer to pass on the entire tax to its customers. Addressing the defendants' contention in *Crane*

that plaintiff, since it was not the taxpayer, lacked standing to challenge the tax, the court, after noting the "complementary and interlocking nature" of the retailers' occupation tax and the use tax, said that plaintiff was not compelled to rely upon the lessor for protection of its interest and that "To the extent to which the validity of the use tax and its application to plaintiff is dependent upon the validity of the retailers' occupation tax, it may also challenge that tax." (25 Ill. 2d 521, 528.) This observation is equally applicable to the present taxing scheme.

In support of their contention that Bell is the taxpayer and that plaintiff is without standing to bring this action, defendants cite *Agron v. Illinois Bell Telephone Co.* (7th Cir. 1971), 449 F.2d 906, *cert. denied* (1972), 405 U.S. 954, 31 L. Ed. 2d 231, 92 S. Ct. 1171.

Agron involved the question whether the Illinois message tax and the same Chicago city message tax considered here were properly includable in the tax base on which the Federal excise tax was computed. Agron contended that the State and city taxes were actually imposed on telephone subscribers and that the amounts paid for those taxes could not be included in "amounts paid for *** communication services" as provided by the Federal statute. The court disagreed; after discussing the Illinois precedents, without reference, however, to *Crane Construction Co. v. Symons Clamp & Manufacturing Co.* (1962), 25 Ill. 2d 521, the court determined that the message taxes were occupation taxes imposed upon Illinois Bell and that the charges passed along to subscribers could be included in the tax base for the Federal excise tax.

We do not consider *Agron* controlling. Unlike here, the question of the plaintiff's standing to bring that action was neither raised by the parties nor decided by the court. Clearly Bell's subscribers, who have fully borne the burden of the city's message tax, have "a personal claim, status or

right which is capable of being affected" (*Underground Contractors Association v. City of Chicago* (1977), 66 Ill. 2d 371, 376), and thus have standing to bring this action.

We consider next the contention of the defendants and *amici* that the Illinois Commere Commission has primary jurisdiction to order refunds of excessive telephone rates and that plaintiff has not exhausted his administrative remedies. In *Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350, the court considered the doctrine of exhaustion of remedies and concluded that exceptions to the requirement should be made only where an ordinance or statute is attacked as unconstitutional in its entirety, where there exist multiple remedies before an administrative body and at least one has been exhausted, or where irreparable harm will result from further pursuit of administrative remedies. (60 Ill. 2d 350, 358.) In *Northwestern University v. City of Evanston* (1978), 74 Ill. 2d 80, the court, citing *Van Laten v. City of Chicago* (1963), 28 Ill. 2d 157, and *County of Lake v. MacNeal* (1962), 24 Ill. 2d 253, recognized that "[a] party will not, of course, be required to exhaust his administrative remedies when it would be patently useless to seek relief before local bodies." 74 Ill. 2d 80, 88.

It is not disputed that since the enactment of the enabling legislation the Illinois Commerce Commission has authorized utilities to compute the tax in the manner followed here. Although we do not read plaintiff's attack on the ordinance as an assertion that it is "unconstitutional in its entirety" (*Allphin*), we are of the opinion that the undisputed facts demonstrate that an attack on the percentage permitted to be charged, on the grounds asserted here, would indeed be futile, thus invoking the exception recognized in *Northwestern University v. City of Evanston.*

The sole issue presented here is one of statutory interpretation, and there is no question which requires the

Commerce Commission's expertise. Although under section 36(a) of the Public Utilities Act the Commission has the power "to investigate whether or not such supplemental schedule correctly specifies such additional charge" (Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36(a)), it has no power to suspend the additional charge. Its powers are limited to requiring a refund of the excess and ordering the filing of an amended supplemental schedule. Without the power to suspend the charge and with the subscriber's recourse being limited solely to seeking a refund, it can hardly be said that the administrative procedure provides plaintiff an adequate remedy. Under these circumstances we hold that the circuit court properly exercised jurisdiction in this cause.

Finally we consider the question whether the city's message tax itself should be included in the tax base on which the same message tax is calculated. Citing *Vause & Striegel, Inc. v. McKibbin* (1942), 379 Ill. 169, and *Agron v. Illinois Bell Telephone Co.* (7th Cir. 1971), 449 F.2d 906, defendants argue that the ordinance provides that the 5% tax is to be levied on "gross receipts," which is defined as the consideration received for the transmission of messages, without any deduction for "any other expenses whatsoever." In *Vause* the court considered a rule promulgated by the Department of Finance which provided that amounts added by retailers to the purchase price of goods in order to pay the 3% retailers' occupation tax were to be included in the base on which the tax was computed. In the example given in the rule itself, if a retailer charged $1 for goods and added 3 cents to the price to reimburse itself for the tax, the "gross receipts" on which the tax would be levied would be $1.03. Plaintiffs contended that only $1 should be included in the "gross receipts." The court disagreed and held the rule valid, pointing out that the General Assembly had made no distinction between amounts billed the customer as tax or as purchase price.

The retailers' occupation tax was later amended to allow the deduction of amounts taken by retailers for reimbursement of the tax. In *Agron* the Seventh Circuit held that the Illinois and Chicago message taxes were includable in the base on which the Federal excise tax was computed.

Defendants contend that both *Vause* and *Agron* stand for the proposition that a tax passed on to consumers is a part of the selling price charged them and is therefore includable in the receipts subject to the tax. As plaintiff points out, however, neither *Vause* nor *Agron* is dispositive of the present case. In *Vause*, unlike Bell here, the retailer, in passing the tax along to its customers, acted without statutory authority, and absent such statutory authority the additional charge merely increased the price of the goods sold. In *Agron* the court did not consider the propriety of assessing a tax on the tax itself; it decided that State and local occupational taxes were properly includable in the base on which the Federal excise tax was assessed.

In support of its contention that it has correctly included in "gross receipts" the amount of the municipal tax, Bell cites *Old Colony Trust Co. v. Commissioner* (1928), 279 U.S. 716, 73 L. Ed. 918, 49 S. Ct. 499, and *Safe Harbor Water Power Corp. v. United States* (Ct. Cl. 1962), 303 F.2d 928. In *Old Colony Trust Co.* the Supreme Court held that an employer's payment of its employee's income tax constituted additional taxable income to the employee. In *Safe Harbor Water Power Corp.* the Court of Claims held that successive payments of the additional tax until the tax obligation was reduced to an infinitesimally small amount were also taxable. Defendants argue that the factual situations in those cases are analogous to that here, and that if income tax reimbursements are deemed income upon which further taxes can be imposed, the tax paid by plaintiff and the members of the class was a portion of "gross receipts" on which the city message tax was properly levied. We do not so interpret

those cases. In our opinion they are authority only for the proposition that reimbursement by a third person to a taxpayer of his income taxes paid was a benefit to the recipient substantially indistinguishable from other income and therefore taxable, and is not authority for defendants' interpretation of the statute here considered.

The definition of "gross receipts" contained in section 1 of the Messages Tax Act provides that, "In case credit is extended, the amount thereof shall be included only as and when payments are received." (Ill. Rev. Stat. 1977, ch. 120, par. 467.1.) Although no similar provision is contained in the Chicago ordinance, it is clear that services provided on credit are not includable in "gross receipts" until payment is actually received. The long-established rule is that the "Taxing laws are to be strictly construed and they are not to be extended beyond the clear import of the language used. If there is any doubt in their application they will be construed most strongly against the government and in favor of the taxpayer. *Peoples Gas Light Co. v. Ames*, 359 Ill. 152." (*Oscar L. Paris Co. v. Lyons* (1956), 8 Ill. 2d 590, 598.) Although the tax was levied upon Bell, it was passed on to the subscriber, and no liability was incurred on Bell's part until payment was actually received. It would appear, therefore, that plaintiff, as the one who paid the tax, is entitled to the benefit of the foregoing rule, and its application would proscribe the construction of the statute which would result in an increase, both in the amount of the tax paid the city and the "costs of accounting" permitted to be charged by the nominal taxpayer. We hold, therefore, that construing the term "gross receipts" to include the municipal tax is erroneous.

For the foregoing reasons the order of the circuit court of Cook County is affirmed and the cause is remanded to that court for further proceedings.

Order affirmed; cause remanded.

MR. JUSTICE UNDERWOOD, dissenting:

My disagreement with the majority stems not from the resolution of the narrow tax question involved herein, but from the fact that my colleagues felt compelled to address that issue at all. In my opinion, the plaintiffs should be required to exhaust their administrative remedies before seeking judicial relief.

The majority refers to our recent decision in *Northwestern University v. City of Evanston* (1978), 74 Ill. 2d 80, as support for the conclusion that the plaintiffs should not be required to exhaust their administrative remedies before the Illinois Commerce Commission. While requiring exhaustion in the *Northwestern University* case, we cited *Van Laten v. City of Chicago* (1963), 28 Ill. 2d 157, and *County of Lake v. MacNeal* (1962), 24 Ill. 2d 253, for the proposition that "[a] party will not, of course, be required to exhaust his administrative remedies when it would be patently useless to seek relief before local bodies." (74 Ill. 2d 80, 88.) The crucial determination which must be made, of course, concerns the precise meaning of the phrase "patently useless."

In *Van Laten,* the plaintiff brought a declaratory judgment action seeking a judicial determination that a certain Chicago zoning ordinance which classified plaintiff's property as residential was void. The court held that it was unnecessary for the plaintiff to exhaust his local administrative remedies where the city of Chicago had twice amended its zoning ordinance after the plaintiff had filed his declaratory judgment action, and the amendments retained the residential classification despite an adverse recommendation by the master after evidence had been taken. In *County of Lake,* the court held that where a municipality institutes an action in court against a property owner for violation of a zoning ordinance, the property owner is entitled to defend on the grounds that the ordinance is invalid even though he has not first sought

local administrative relief, since the action of the municipality in filing a complaint indicates that such a step would be useless.

What is involved in the present case, however, is quite a different matter. Apparently, *no one* has appeared before the Commerce Commission to challenge the method of computation that is employed in calculating the amount of the municipal message tax. While it is true that the Commerce Commission staff was involved in the development of the present formula for computation of the tax, there is no evidence that, given the opportunity, the Commission would not act fairly and competently in resolving a challenge to the tax. In short, under the facts and circumstances of the present case, I do not think it can be said that it would be "patently useless" for the plaintiffs to present their complaint to the Illinois Commerce Commission. Therefore, the narrow exception to the exhaustion requirement recognized by this court in the *Northwestern University* case would appear to be inapplicable here.

Furthermore, contrary to the conclusion of the majority, I think the administrative procedures set forth in the Public Utilities Act (Ill. Rev. Stat. 1977, ch. 111 2/3) provide plaintiffs with an adequate remedy. Section 72 of the Act provides in part, as follows:

> "When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount." Ill. Rev. Stat. 1977, ch. 111 2/3, par. 76.

While plaintiffs could have proceeded under section 72, an alternative, and more specific, remedy is provided in

section 36(a):

> "The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order *shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission.*" (Emphasis added.) Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36(a).

In contrast to the majority's statement that the customer's only remedy is a refund, this section clearly grants the Commerce Commission authority to investigate the "additional charge," hold hearings on the matter, order refunds with interest, and require the utility to file an amended supplemental schedule in accordance with the Commission's findings. It is difficult to conceive of a more complete and adequate remedy.

The majority's concern about the Commission's lack of power to "suspend the additional charge" is misplaced. Although the Commission is given the power to suspend certain rate schedules in section 36 of the Public Utilities Act, but not in section 36(a), this in no way impairs the effectiveness of the remedies provided in section 36(a). The procedure for suspension of a proposed rate change is set forth in section 36 as follows:

> "Whenever there shall be filed with the Commission any schedule stating an individual or joint rate or other charge *** the Commission shall have power *** to enter upon a hearing concerning the propriety of such rate or other charge *** and pending the hearing and decision thereon, such rate or other charge *** shall not go into effect. *** All such rates or other charges *** not so suspended shall, on the expiration of 30 days from the

> time of filing the same with the Commission *** go into effect and be the established and effective rates or other charges ***." (Ill. Rev. Stat. 1977, ch. 111 2/3, par. 36).

The language was interpreted in *Antioch Milling Co. v. Public Service Co.* (1954), 4 Ill. 2d 200, 204, to mean "that the commission shall analyze a proposed rate change, and reach a conclusion as to whether it is to be permitted to go into effect without a formal hearing, or whether it is to be suspended until a formal hearing has been had."

In contrast, section 36(a) provides that the supplemental schedule specifying the "additional charge" becomes effective upon filing and may not be suspended by the Commission. All this means, however, is that the supplemental schedule is effective pending any investigation and hearing by the Commission. If, after a hearing, the Commission determines that the supplemental schedule does not specify correctly the additional charge, it has the power to order a refund with interest and can require the utility to file an amended supplemental schedule correctly stating the additional charge. Despite the Commission's lack of authority to suspend the supplemental schedule pending a hearing thereon, it can hardly be said that the plaintiffs lack an adequate remedy before the Commission.

Therefore, I would require the plaintiffs to exhaust their administrative remedies before the Commerce Commission.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX E

STATE OF ILLINOIS }
COUNTY OF COOK } SS:

IN THE

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *Plaintiff,* v. CITY OF CHICAGO, a municipal corporation; ILLINOIS BELL TELEPHONE COMPANY, a corporation, et al., *Defendants.*	No. 77 CH 4930

MEMORANDUM OPINION AND RULING

The plaintiff in this class action suit allegedly represents all residents of the City of Chicago who subscribe to the services of Illinois Bell Telephone Company (hereinafter referred to as "Bell") and plaintiff alleges that the class he purports to represent including himself have paid the tax complained of in this complaint. Pursuant to enabling authorization of the State Municipal Code (Ill. Rev. Stat. ch. 24, Sec. 8-11-2), the City of Chicago (hereinafter the "City") passed an ordinance imposing an "occupation tax" on Bell at the rate of five percent on gross receipts received by Bell for transmission of electronic messages originating in the City. The Public Utilities Act (Ill. Rev. Stat. ch. 111-⅔, Sec. 36 (a) and (b)) permits Bell to include the amount of the occupation tax in the price it charges its

customers and to make additional charges on the five percent of the gross receipts to cover the cost of the "accounting," or the collection of the tax.

"Gross receipts" is defined by the State statute and City ordinance as "the consideration received for the transmission of messages . . . and shall be determined without any deduction on account of the cost of the service, product or commodity supplied, the cost of materials used, labor or service cost, or "—and I add emphasis or underlining this; —"*or any other expenses whatever.*"

The City interprets this definition to include not only consideration received for the transmission of electronic messages originating in the City, but also receipt of the message tax itself. This results, plaintiff asserts and defendants agree, in a "tax on itself," or a "boot-strap" tax which "is capable of being compounded to infinity." Under this interpretation of "gross receipts" the total additional charge to a customer is 6.56 percent rather than the five percent tax specifically authorized by the State statute and City ordinance.

Plaintiff alleges that such boot-strapping of the tax is "irrational, unreasonably burdensome and oppressive" and complains that "to the extent that Section 132-31 of the City Code and Sections 36 (a) and (b) of the Public Utilities Act are construed by the defendants herein as authorizing the collection of the tax upon the tax itself, said ordinance and provisions of the Public Utilities Act are violative of plaintiff's rights under the Due Process Clause of the 14th Amendment of the U.S. Constitution, and of Article 1, Section 2 of the Illinois Constitution of 1970."

Plaintiff alleges further that that portion of the municipal tax which exceeds the statutory base of five percent of gross receipts results in unjust enrichment to the City, and

the collection and retention of that portion of the additional accounting charges predicated on the excessive tax results in unjust enrichment to Bell.

Plaintiff prays for certification as a class; for a declaration that Illinois Revised Statutes Section 111⅔, Section 36 (a) and (b), *supra*, and the Municipal Code of Chicago, Sec. 132-31, *supra*, are constitutionally invalid as applied to the plaintiff and the class; for temporary and permanent injunctions against collection of the allegedly excessive tax and accounting charge or, in the alternative, for creation of a Special Protest Fund to hold said tax and accounting charges pending final resolution of this case; for an accounting from the City and Bell for all taxes and accounting charges collected from the effective date of the municipal ordinance creating the tax; for a refund to all Bell customers who have heretofore paid the allegedly excessive charges; and for attorneys' fees and costs.

Defendants then filed separate Motions to Dismiss, and a third Joint Motion to Dismiss. These motions allege: 1) that plaintiff has no standing to challenge the validity of the statute and ordinance inasmuch as Bell is the taxpayer; 2) that plaintiff is really charging that Bell's rates are excessive, that the Illinois Commerce Commission has exclusive jurisdiction over rates, and that plaintiff has therefore not exhausted all administrative remedies; 3) that this action is not a proper class action since Bell, as the sole taxpayer, is the only member of the affected class; and 4) even if plaintiff has a valid cause of action, it is a Complaint for Declaratory Judgment and therefore should be transferred to the Miscellaneous Section of the Law Division.

In support of their contention that plaintiff has no standing, defendants rely on *Agron vs. Illinois Bell Telephone Co.*, 449 F.2d 906. *Agron* clearly holds that Bell is the tax-

payer of the occupation tax, even though the economic burden of such tax is passed on to the consumer. Although as a federal case *Agron* itself can only be taken under advisement—well, that's not precisely stated, although as a federal case *Agron* is of advisory value only to this Court; there are a myriad of Illinois cases in agreement with this proposition. (See, e.g. *People's Drug Shop, Inc. vs. Moysey,* (1943) 384 Ill. 283; *Reif vs. Barrett,* (1933) 355 Ill. 441; *Winter vs. Barrett,* (1933) 352 Ill. 441; *Fischmann & Sons Inc. vs. Dept. of Revenue,* (1957) 12 Ill. 2d 253).

Plaintiff's case, *East St. Louis vs. Union Electric Company,* 37 Ill. 2d 537 (1967), was distinguished in *Agron.* Although the Court in *East St. Louis* recognized that the occupation tax was passed on to its consumers, the issue was whether or not Union Electric could subtract the tax from another fee owed the City under a franchise agreement; the ability of a consumer to challenge the tax was never in contention. Thus, Defendant's argument is correct; however, this fact is not dispositive of the issue. The question then becomes whether the plaintiff may challenge the validity of the ordinance even though he is not the initial taxpayer.

In this connection perhaps reasoning from the other side of the question but supporting the plaintiff's position is *Consolidated Distilled Products, Inc.* v. *Mahin,* 56 Ill. 2d 110 (1974). Our Supreme Court stated in its opinion by Mr. Justice Schaeffer that the Court need not reach the constitutional issue of whether a state tax which imposes a greater tax on wine sold in this state which was made from grapes grown outside of this state than the tax imposed on the same wine, of the same type of wine of the same alcoholic content made from grapes grown in Illinois. I think it was the grape growing industry in Macomb County that was involved in that case.

And the Court said that since the plaintiffs had stipulated with the interveners who represented the consumers that the tax had been passed on to the consumers in the form of increased prices, the plaintiffs, who were wholesalers and were complaining of the tax, had no standing. This is somewhat the reverse of that situation where the persons who bear the tax are contending they do have standing.

The first case to deal with this question was *Crane Construction Company* vs. *Symons Clamp & Mfg. Co.*, 25 Ill. 2d 521, a 1962 decision wherein a lessee was allowed to challenge the constitutionality of an occupation tax levied on the lessor. The case may be distinguished, however, on the ground that two taxes were involved; the Court allowed the lessee to challenge the occupation tax because an interrelated use tax was also levied directly on the lessee but collected by the lessor. The Court specifically stated that if the occupation tax alone were involved, as was true in *Agron*, the Appellate Court's contention that Crane had no standing to question its validity would have some merit. However, later cases relied on *Crane* to extend its ruling to cases more apposite to the one at bar.

In *Commonwealth Edison Company* vs. *Community Unit School Dist. No. 200, Du Page County*, 44 Ill. App. 3d 665 (1977), some school districts challenged the validity of a message tax ordinance similar to the one challenged in this case except that the amount taxed was three percent of the gross receipts. In deciding that plaintiffs had standing the Court said:

> "The purpose of the doctrine of standing is merely to preclude persons having no interest in the controversy from bringing suit (cite omitted). It is not meant to preclude a valid controversy from being litigated. And where the person most directly affected actually has no interest in the controversy, the courts in recent years

> have been more liberal in allowing persons indirectly affected to bring suit. Here the utilities directly affected as the initial taxpayer can be said to have no real interest in the controversy since the charge is added to the user's bill . . . .(Hence,) it is not necessary that a party must be the initial taxpayer in order to challenge the constitutionality of a tax." (At Page 670)

The Court in *Adler* vs. *Illinois Bell Telephone Co.*, 52 Ill. App. 3d 167 (1977), another case involving consumers challenging the message tax which was recently upheld by the Illinois Supreme Court, relied on *Commonwealth Edison* and ruled that plaintiff had standing. Finally, in *Williams* vs. *City of Chicago*, 36 Ill. App. 3d 216 (1976), a lessee was allowed to challenge the constitutionality of a municipal tax ordinance which gave the right of administrative review only to the lessor. The Court, relying on *Crane*, stated, "Here, also, in the absence of any means of administrative review, reason dictates that the lessees who bear the burden of the tax have standing to challenge its validity." (At Page 221.)

Thus, it would follow that the ability of those, other than the initial taxpayer, who actually bear the economic burden of the tax to challenge the validity of the tax is well-recognized by our State Supreme Court though not established on the federal level.

Defendants' next contention is that the plaintiff is really charging Bell with excessive rates and should complain to the Illinois Commerce Commission rather than to this court. In explaining the determinative factors in recognizing the plaintiff's standing, the Court in the *Commonwealth Edison* case, *supra*, stated:

> "Other taxes are treated as expenses which the Illinois Commerce Commission may consider in determining whether to allow a rate increase. Here the Commission

has no choice. If the tax is levied, the additional charge must be allowed." (Pages 669-670)

The factor which determines where the plaintiff should take his case is controlling the instant case, as in *Commonwealth Edison*, the Illinois Commerce Commission has no control over the issue; it must follow the definition of gross receipts found in the ordinance as interpreted by the City. The Commission cannot repeal, modify, or in any way amend the ordinance, or enact another ordinance or impose a city tax. The ICC is powerless to grant relief to the plaintiff. Relief from the ordinance, as contrasted with objections to rates, can only be afforded by the courts.

Next, defendants assert that plaintiff has failed to state a cause of action because the validity of the message tax has already been determined. In support of this contention they cite *Agron, supra,* and *Vause & Striegel, Inc.* vs. *McKibbin,* 379 Ill. 169 (1942). *Agron* is clearly distinguishable from this case. The tax challenged there was a federal excise tax on additional charges which included state and local occupation taxes. This constituted a tax on another tax rather than a tax on itself, and was therefore only compiled once and was not capable of being compounded to infinity as is the tax in the case at bar. In *Vause, supra,* it was determined that if a retailer chose to pass a sales tax on to the consumer, the amount became part of the selling price and was not considered a tax even though it was listed as such on the bill to the customer. The retailer then had to pay the tax on whatever sum he charged the customer at the time of the purchase, and the tax was computed just once. Here, however, there is a statutory mandate that the tax itself be included in the gross receipts, resulting in the circuity challenged herein. This apparently is the first instance of a challenge based on this argument, and it deserves to be heard.

The vice in the application of the ordinance is that it is stated to be a five percent tax passed on to the Bell customer, when as applied it is in fact a 6.56 percent tax passed on to the Bell customer. Assuming the good faith and purity of motives of the City and Bell, the practice here complained of results in an unwholesome, bald deception of Bell's subscribers.

If plaintiff has stated a cause of action, his class deserves certification. Clearly the subscribers to Bell in the City of Chicago are too numerous to make joinder practicable, all claims arise from similar transactions with common questions of fact and law, and plaintiff will be able to fairly and adequately represent the class. Because it is a class action suit, any declaratory judgment in this case can and must be made by this Court and not by a Court of law, as defendants aver.

The several motions to dismiss must be denied. Plaintiffs will submit an appropriate order within three days which shall include a provision of sequestration for all funds collected by Bell which exceed five percent of the "gross receipts" exclusive of the five percent tax, until the further order of this Court. The definition of the class, of course, is all those subscribers who have paid the additional 1.56 percent tax and whose claims for recovery of such tax are not barred by the applicable statute of limitations.

Plaintiff's attorney will prepare an order.

ENTER:

Dated: 12-27-78

Judge

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *Plaintiff,* v. CITY OF CHICAGO, a municipal corporation; ILLINOIS BELL TELEPHONE COMPANY, a corporation, et al., *Defendants.*	No. 77 CH 4930

ORDER

This cause comes on to be heard on the separate and joint motions of defendants CITY OF CHICAGO (CITY) and ILLINOIS BELL TELEPHONE COMPANY (BELL) to dismiss the class action complaint herein on the grounds (a) that plaintiff has no standing to challenge the validity of the City's message tax ordinance, because Bell, not the plaintiff is the taxpayer; (b) that the exclusive primary jurisdiction of this cause is vested in the Illinois Commerce Commission and that plaintiff has not exhausted his administrative remedies before that body; (c) that the complaint may not be maintained as a class action since Bell is the sole taxpayer and the only member of the affected class; (d) that the complaint fails to state a cause of action; (e) that even if plaintiff has a valid cause of action, his complaint is for a declaratory judgment and should therefore be transferred to the Miscellaneous Section of the Law Division of the Circuit Court; and on other grounds asserted in the motions to dismiss, as well as in memoranda filed in support thereof. The court duly con-

sidering said motions, the briefs of the parties, and hearing the arguments of counsel,

FINDS:

(1) That the Court has jurisdiction over the parties hereto and the subject matter of the complaint;

(2) Plaintiff, for himself and on behalf of all other persons similarly situated, has standing to challenge the validity of the City of Chicago utility tax upon telephone messages originating in the City;

(3) The complaint states a good cause of action in chancery in that plaintiff and the class he represents have no adequate remedy at law, nor an administrative remedy before the Illinois Commerce Commission;

(4) The complaint pleads the requisite elements of a proper class action within the provisions of CPA § 57.2 in that:

(a) The class is so numerous that joinder is impracticable;

(b) The questions of fact, if any, and the questions of law are the same as to all members of the class;

(c) Plaintiff and plaintiff's attorneys can and will fairly and adequately protect the interests of the class;

(d) A class action is an appropriate method for the fair and efficient adjudication of this matter.

For the reasons more fully set forth in the Court's memorandum ruling filed herein on the date hereof, the Court makes the following additional and specific findings:

(5) The City and Bell have improperly interpreted the "gross receipts" base of the City's message tax as including not only the consideration received from the transmission of messages originating within the City, but in addition, the receipt of the message tax itself;

(6) The expanded interpretation of the "gross receipts" base is not authorized either by the State Municipal Code (Ill. Rev. Stats., ch. 24, § 8-11-12) or by the Municipal Code of Chicago (Mun. Code of Chicago, § 132-30, et seq.);

(7) The expanded and unauthorized interpretation of "gross receipts" as including the tax on itself also results in an unauthorized collection charge made by Bell for its own account pursuant to sec. 36(a) of the Public Utilities Act (Ill. Rev. Stats. 1975, ch. 111-2/3, par. 36(a);

(8) Although Bell is nominally the taxpayer, the entire burden of said utility tax is passed on by Bell to its customers together with a certain percentage collection charge as provided in said sec. 36(a) of the Public Utilities Act;

(9) The current authorized tax on the gross receipts received by the telephone company from the transmission of electronic messages originating in the City is 5%. To the extent that the interpretation by defendants of "gross receipts" includes collection of the tax itself, the additional charge to Bell's customers is unauthorized, illegal, irrational, unreasonably burdensome and oppressive to plaintiff and the class he represents;

(10) To the extent that secs. 132-31 of the City Code and secs. 36(a) of the Public Utilities Act are construed by the defendants as authorizing the collection of the tax upon the tax itself, said ordinance and provisions of the Public Utilities Act are violative of the due process clause of the Fourteenth Amendment to the United States Constitution and Art. I, § 2 of the Illinois Constitution of 1970;

(11) The portion of the municipal tax which exceeds the statutory base of 5% of gross receipts results in unjust enrichment to the City and is unconscionable. The collection and retention of that portion of the additional accounting charge predicated on the excessive tax results in unjust enrichment to Bell and is unconscionable;

(12) Unless restrained and enjoined, plaintiff and the members of plaintiff's class will suffer immediate and irreparable injury inasmuch as the segment of the tax herein declared to be illegally collected, and a portion of the collection charge which includes said illegal portion of gross receipts, will be commingled by City and Bell with taxes and collection charges lawfully collected, and those funds will be disbursed by dependants and thus placed irretrievably beyond recovery, for which injury plaintiff and the class have no adequate remedy at law;

(13) The action may be maintained as a class action pursuant to Ill. Rev. Stats., ch. 110, § 57.2 on behalf of the following class which is hereby defined and certified as:

> "All customers of Illinois Bell Telephone Company located or residing, in the City of Chicago, who during the period of ten years next before the filing of the complaint herein on July 18, 1977, have paid to Bell a charge for the City's message tax in excess of the 5% rate authorized by law and who have accordingly been overcharged in the collection charge made by Bell during said period."

WHEREFORE, IT IS ORDERED AND ADJUDGED AS FOLLOWS:

A. Defendants' motions to dismiss the complaint are denied.

B. The parties representing to the Court that there is no genuine or material dispute as to the facts alleged in the Complaint, the said motions to dismiss may stand as defendants' answers to the Complaint with leave to amend within fourteen (14) days from the date hereof.

C. Plaintiff's prayer for a preliminary injunction is granted and the Clerk of the Court is ordered to issue a Writ of Preliminary Injunction under the seal of this Court:

(1) Effective immediately and until the further order of the Court, Bell is directed to set aside and segregate that portion of the charge it makes to its customers for the City of Chicago utility tax on electronic messages originating within the City which exceed the current authorized rate of 5% of the gross receipts; and that portion of its additional charge for collection and accounting for said message tax predicated on the excessive tax;

(2) Effective immediately and until the further order of the Court, Bell will deposit all such illegal taxes and charges so collected from its customers into a special Protest Fund hereby created, and said fund shall be administered and maintained under the supervision of this Court. All said funds shall be sequestered and maintained in interest bearing obligations having a maturity of at least 90 days and said securities shall be approved by the Court in advance of purchase. Bell shall make a monthly report to the Court, with copies to plaintiff and the City, of the funds collected and deposited into the Protest Fund;

(3) Effective immediately and until the further order of the Court, the defendants and each of them, their respective successors and employees, officers, agents and all persons acting in concert with them are enjoined from disbursing any of the moneys deposited, or to be deposited, in said Protest Fund, nor the interest earned thereon, except pursuant to order of this Court.

D. For good cause shown said Writ of Injunction shall issue without bond.

E. The action shall be maintained as a class action on behalf of all persons in the class herein defined and certified.

F. Provision for adequate notice to the class and adjudication of plaintiff's prayer for an audit and accounting and other items of relief are hereby reserved.

G. This order shall be effective immediately as of the time and date of entry.

DATED: December 19, 1978, at 2 P.M. o'clock.

ENTER: /s/ NATHAN M. COHEN
Judge

SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

LEONARD E. HANDMACHER
134 North LaSalle Street
Chicago, Illinois 60602
(312) 332-4222
Attorneys for Plaintiff

APPENDIX F

Relevant Statutory Provisions

Ill.Rev.Stat., ch. 24, § 8-11-2

"8-11-2. *Taxation of occupations or privileges*

§ 8-11-2. The corporate authorities of any municipality may tax any or all of the following occupations or privileges:

1. Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality.

• • •

None of the taxes authorized by this Section may be imposed with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State or any political sub-division thereof; nor shall any persons engaged in the . . . business of transmitting messages be subject to taxation under the provisions of this section for such transactions as are or may become subject to taxation under the provisions of the 'Municipal Retailers' Occupation Tax Act' authorized by Section 8-11-1; nor shall any tax authorized by this section be imposed upon any person engaged in a business unless such tax is imposed in like manner and at the same rate upon all persons engaged in businesses of the same class in the municipality, whether privately or municipally owned or operated."

Ill. Rev. Stat., ch. 111⅔, § 36(a)

"36. *Change of rates—Notice—Suspension of rates—Temporary schedule—Charge for taxes*

• • •

(a) Whenever a municipality pursuant to Section 8-11-2 of the Illinois Municipal Code, as heretofore and hereafter

amended, imposes a tax on any public utility, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge. Such utility shall file with the Commission a true and correct copy of the municipal ordinance imposing such tax; and also shall file with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer. The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission."

Chicago Municipal Code, § 132-31.

"132-31. A tax is imposed upon all persons engaged in the business of transmitting messages by means of electricity at the rate of two per cent of the gross receipts from such

business after December 31, 1955, originating within the corporate limits of the city, subject, however, to all the provisions, conditions and limitations in section 23-113 of the Revised Cities and Villages Act, authorizing this tax, and to all the provisions, conditions and limitations in this ordinance, consistent with the powers conferred upon the city by said section and other relevant law.

A tax is imposed upon all persons engaged in the business of transmitting messages by means of electricity at the rate of three per cent of the gross receipts from such business after December 31, 1967, originating within the corporate limits of the city. This tax is in addition to the tax imposed at the rate of two per cent of the gross receipts of such business contained in the first paragraph of this section, so that subsequent to December 31, 1967, a tax is imposed upon all persons engaged in the business of transmitting messages by means of electricity at the rate of five per cent of the gross receipts from such business."

APPENDIX G

Excerpts From Illinois Bell's Petition For Rehearing In The Illinois Supreme Court, pp. 5-10.

"In its opinion in this appeal, this Court correctly held that Illinois Bell's liability for a retroactive refund was not decided in *Getto I;* that while certain of Illinois Bell's legal defenses asserted in this appeal were not sufficient to resolve the question of Illinois Bell's liability in its favor as a matter of law, nevertheless, "[a]s of this stage of the action here, no final order or determination of liability has been made." (Slip Op. at 5.) Therefore, this Court created an inconsistency by affirming Judge O'Brien's turn-over order, while at the same time, rejecting the grounds upon which that order was based.

THE DUE PROCESS PROBLEMS ARISING FROM THE INCONSISTENCY OF THIS OPINION

If this inconsistency is not resolved by this Court modifying its order and reversing the trial court's self-executing, turn-over order, then this Court will be affirming a pre-judgment attachment order not even contemplated by Judge O'Brien. If this pre-judgment attachment order is affirmed, this Court will reverse over one hundred years of legal precedent in this state, and will violate Illinois Bell's right to due process and equal protection of the law as guaranteed by the Constitution of the State of Illinois and the Fourteenth Amendment to the Constitution of the United States.

It is a violation of a person's due process rights to have his property seized *pendente lite*[2] unless such action.

---

[2] That the deprivation is only of the use of property, and perhaps only temporarily, does not put the seizure beyond scrutiny under the due process clause. "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of

(footnote continued on next page)

is authorized by a law which requires an initial factual showing by the plaintiff that sufficient grounds exist to justify the seizure and provides notice and an evidentiary hearing at a meaningful time. *See e.g., Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, (1969) (Wisconsin pre-judgment garnishment seizure of wages without notice and prior hearing violated a person's right to due process); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (pre-judgment seizures under states' replevin statutes violated a person's right to due process because there was no requirement that the plaintiff make an initial factual showing that adequate grounds existed to justify the seizure); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) (validity of a pre-judgment seizure under a Louisiana sequestration act upheld because it required the creditor to make an initial showing that he was entitled to pre-judgment relief and it provided a full hearing within a meaningful time); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, (1975) (corporation's right to due process violated when its bank account was garnished without a pre-seizure showing that reasonable grounds existed to support the seizure).

Additionally, it is well established that pre-judgment attachment is purely a statutory remedy. For example, in *Harris* v. *Balk*,[3] 198 U.S. 215 (1905) the United States Supreme Court stated:

> Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied.

---

property. Any significant taking of property by the state is within the purview of the due process clause." *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601, 606 (1975) *quoting Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

[3] This case was overruled on other grounds in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

198 U.S. at 222. The same year, this Court in *Gilbert* v. *Yunk*, 214 Ill. 237 (1905) echoed the same theme:

> The only authority for the issuance of an attachment writ and the seizure of property thereunder is the alleged existence of some statutory ground of attachment. In the absence of such ground the right to seize property in advance of the rendition of a judgment and the issuance of execution thereon does not exist.

214 Ill. at 240-41. *See also, Martin* v. *Schillo*, 389 Ill. 607 (1945); *Apollo Metals, Inc.* v. *Standard Mirror Co.*, 87 Ill.App.2d 383 (1967).

In other words, as this Court held in *Dunham* v. *Kauffman*, 385 Ill. 79 (1944), a pre-judgment attachment will not lie to aid a suit in equity.

> In earlier cases in Illinois, it was held that there is no such thing as equitable attachment. . . .
>
> In Illinois the real distinction between law and equity still exists and there is no authority for issuing a writ of attachment in an equity proceeding based upon facts and circumstances such as appear in this case. . . .
>
> [T]here is a lack of specific statutory authority for the issuance of an attachment in aid of a purely equitable suit prior to judgment. . . .

385 Ill. at 85-6. *See also, Bigelow* v. *Andress*, 31 Ill. 322 (1863).

The Illinois Attachment Act, therefore, is the authority that permits a party to obtain a pre-judgment property seizure *pendente lite*. Ill. Rev. Stat. ch. 11, §§ 1 *et seq.* (1979). Section 1 of the act provides the only substantive grounds for attachment: where the debtor is a non-resident, has attempted to evade process, has fled or is about to flee the jurisdiction, is about to remove his property

from the jurisdiction, has within two years fraudulently conveyed or concealed his property to the detriment of his creditors, or where the debt sued for was fraudulently induced by a written statement. Section 2 requires the party seeking the attachment to file an affidavit which shows, among other things, the facts establishing one or more of the grounds set forth in Section 1. Section 4a requires that the plaintiff secure a bond in double the sum sworn to be due. An attachment issued without a bond is illegal and void.

Of particular significance to this case is *Quern* v. *Hernandez,* 440 U.S. 951 (1979) in which the United States Supreme Court summarily affirmed the decision of a three-judge district court which held the prior Illinois attachment statute unconstitutional because, *inter alia,*:

> [T]he, the Illinois Act does not require the attachment creditor to set out facts in his affidavit which would entitle him to relief.

Hernandez v. *Danaher,* 405 F.Supp. 757, 762 (N.D. Ill. 1975).

In this case, the plaintiff has made no attempt, by affidavit or otherwise, to demonstrate why he is entitled to pre-judgment relief, and the record is void of any statutory grounds to justify this Court's approval of a pre-judgment attachment order.

Assuming *arguendo* that this Court intends to overrule *Dunham* v. *Kauffman, supra,* and create an equitable attachment, it is respectfully submitted that the constitutional requirements of due process and equal protection would still apply. In fact, regardless of the characterization placed on Judge O'Brien's turn-over order, these constitutional requirements must be satisfied. And in this case, there are absolutely no facts in the record to justify this pre-judgment seizure of Illinois Bell's property under any theory.

We are not unmindful of the provisions of Supreme Court Rule 367, however, we respectfully suggest that the due process issue raised by this Petition for Rehearing is of such significance that oral argument on this issue would be helpful to the Court.

CONCLUSION

By affirming the trial court's order requiring Illinois Bell to make, "as expeditiously as possible," a multimillion dollar, pre-judgment deposit *pendente lite* of all overcharges collected during a ten-year period while, at the same time, rejecting the grounds upon which the trial court's order was based, this Court has created an inconsistency which goes to the very heart of Illinois Bell's rights to due process and equal protection guaranteed by the State and Federal Constitutions.

WHEREFORE, Illinois Bell Telephone Company, defendant-appellant, respectfully requests this Honorable Court to reverse that portion of Judge O'Brien's order which requires Illinois Bell to make a pre-judgment deposit *pendente lite* of all overcharges collected during the ten-year period prior to the filing of plaintiff's complaint.

Respectfully submitted,
JAMES R. BRYANT, JR.
MICHAEL J. KARSON
JOHN T. LENAHAN
225 W. Randolph
Room 27A
Chicago, Illinois 60606
(312) 727-3746
Attorneys for Defendant-Appellant, Illinois Bell Telephone Company

ROBERT D. ALLEN
THOMAS P. HESTER,
Of Counsel"

Opposition

FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1645

In the Supreme Court of the United States

OCTOBER TERM, 1981

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

vs.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S BRIEF IN OPPOSITION

SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

LEONARD E. HANDMACHER
134 North LaSalle Street
Chicago, Illinois 60602
(312) 332-4222
Attorneys for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED

Whether, *after* a preliminary and permanent injunction, a state court of chancery in a class action, without offending the Due Process Clause, may enter an *interlocutory* order directing a public utility to turn over to a court-supervised trustee past overcharges for a municipal utility tax, to sequester such funds pending a *final* determination of liability, if any, and formulation of a feasible program of refunds,

—Where the utility has confessed past overcharges by filing revised schedules with the state utility regulatory commission eliminating the "tax on itself" from future rates; and

—Where the utility has *admitted* its liability for a refund but preferred administration of the refund by the state regulatory commission, rather than by the court appointed trustee?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Statement of the Case	2
Reasons Why The Writ Should Be Denied	7

TABLE OF AUTHORITIES

Banks v. Trainor, 525 F. 2d 837, (7th Cir. 1975)	10
Chicago Title & Trust Co. v. Mack, 47 Ill. 480 (1932)	12
Fuentes v. Shevin, 407 U.S. 67 (1972)	7
Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 98 S.Ct. 245, 57 L.Ed. 2d 364	6
Getto v. City of Chicago ("Getto I") 77 Ill. 2d 346, 396 N.E. 2d 544 (1979)	3, 5
Getto v. City of Chicago ("Getto II") 86 Ill. 2d 39, 426 N.E. 2d 844 (1981)	3, 5, 6, 8, 9
Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed. 2d 406 (1974)	8
North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)	7
Reynolds Holding Co. v. El Paso Electric Co., 70 SW 2d 624, 100 SW 2d 97 (Texas Civil Appeals)	11
Snaidach v. Family Finance Corp., 395 U.S. 337 (1969)	7

Statutes

PAGE

Illinois Revised Statutes:
ch. 24, §8-11-2 2
ch. 111⅔, par. 36(a) 2

Miscellaneous

4 Pomeroy, *Equity Jurisprudence* (5th Ed. 1941) §§1330, 1331 11

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1645

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

vs.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Charles A. Getto, individually and on behalf of all persons similarly situated, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Illinois in this case. That opinion is reported at 86 Ill. 2d 39, 426 N.E. 2d 844 (1981).

STATEMENT OF THE CASE

This action had its genesis as a class suit to recover excessive municipal utility taxes (MUT) and related accounting/collection fees, collected by petitioner (Bell) from its Chicago customers.[1]

The theory of the action was that the City of Chicago and Bell, since 1955 pursued an unauthorized interpretation of the city's ordinance which imposed a tax on the utility's "gross receipts" derived from transmitting messages electronically, but which tax was passed through *in toto* to Bell's Chicago customers as an "additional charge". The misinterpretation consisted of including the collected tax itself as part of the "gross receipts"—in effect a "tax on itself"[2]—and thereby inflated the "additional charge" made to the customers as well as the related accounting/collection commission retained by the utility.

The suit alleged that the interpretation followed by the City and petitioner was unauthorized by the Illinois enabling statute (Ill. Rev. Stats., chap. 24, sec. 8-11-2), and the ordinance (whose language tracked the state's definition). By including the collected tax as part of the gross

---

[1] Contrary to petitioner's assertion (Pet. 2-3), Illinois law does *not* provide that the telephone customers of a municipality imposing a message tax "will bear the economic burden of the tax". The "pass through" authorized by the Illinois Public Utility Act (Ill. Rev. Stats. chap. 111-2/3, par. 36(a)) is wholly optional with the utility. The tax is imposed on the utility, but the utility may charge its customers, in addition to authorized rates, "an additional charge" for the MUT "or any part thereof" and retain for itself 3% of such tax, "or any part thereof to cover costs of accounting."

[2] Contrary to petitioner, the instant class action complaint nowhere challenged the additional charge as a "tax on a tax" (Pet. 4). The claim of a "tax on a tax" was not raised as an issue in this case.

receipts, the "tax on itself" could be compounded to infinity, was irrational and oppressive.

The complaint alleged that the improper billing practice resulted in unjust enrichment both to the City, the ultimate tax recipient, and to Bell, which pocketed a 3% commission of the total tax collected. The complaint prayed for a refund to Bell's Chicago customers of the *illegal portion* of the utility taxes collected and the excessive portion of the accounting/collection charge.

After overruling motions to dismiss challenging the sufficiency of the complaint, and other aspects of the case, the state circuit court held that plaintiff had standing to sue in a court of chancery because no administrative or legal remedy was adequate, that the complaint stated a valid cause of action and could proceed as a class suit. The court made findings of fact and granted a preliminary injunction against future collection of the illegal "tax on itself".

Pending a direct interlocutory appeal of the preliminary injunction[3] to the Illinois Supreme Court, the circuit court

---

[3] Since the chancellor held that the suit could and should proceed as a class action, the preliminary injunction order also defined and certified the class as follows:

> *All customers of Illinois Bell Telephone Company located or residing in the City of Chicago, who, during the period of ten years next before the filing of the complaint herein on July 18, 1977, have paid to Bell a charge for the City's message tax in excess of the 5% rate authorized by law and who have accordingly been overcharged in the collection charge made by Bell during said period.* (Pet. App. B 22a)

The propriety of this class definition was not the subject of the interlocutory appeal in *Getto I*, 77 Ill. 2d 346, 396 N.E. 2d 544 (1979). The definition however, was reviewed and approved in *Getto II*, "subject to amendment or modification before *a final judgment is entered.*" 86 Ill. 2d 39 at 47.

also created a "special protest fund" into which petitioner paid, on a current basis, the challenged portions of the City's message tax and the excessive collection charges. In October 1979 the state high court affirmed the trial court's judgment and sustained the preliminary injunction and the special protest fund.

After affirmance of the preliminary injunction and denial of Bell's request for a rehearing, petitioner filed revised rate schedules with the Illinois Commerce Commission (the Illinois utility regulatory agency), which supplemental schedules eliminated from Bell's rates the "tax on itself".

On return of the mandate from the state supreme court the chancellor entered a series of orders which produced a second interlocutory appeal by the City of Chicago and Bell. In those orders the circuit court made permanent the preliminary injunction, appointed a trustee to take custody of the special protest fund (theretofore left in possession of the City), and reaffirmed the definition of the class contained in the preliminary injunction order.

The chancellor also directed Bell to turn over to the trustee the excessive charges collected by Bell from its customers for the City's message tax and for its own account for the ten-year period preceding the filing of the complaint, (the retroactive period in the class definition embodied in the preliminary injunction order). In denying Bell's petition for rehearing the chancellor stated:

> ". . . There is a question . . . I would like to resolve . . . as quickly as I possibly could . . . I don't mean by denying the motion at this time to say that the ultimate responsibility for the refund for the recovery of the money is either the City or Bell Telephone, I'm not making that decision at this time.
>
> * * *
>
> By making that decision now . . . I'm not foreclosing Bell Telephone Company from seeking [from] the City to reimburse them or fixing the ultimate liability

> for the return of the money on someone other than the Bell Telephone Company." (Pet. App. 26a-27a)

Counsel for Bell informed the court that, *at that stage,* it was not proceeding with any ancillary or cross-claim proceeding against the City. (Pet. App. 27a-28a).

Bell and the City then obtained leave to bring a second interlocutory appeal to the Illinois Supreme Court (*Getto II*). In that appeal Bell challenged, *inter alia,* the turnover order commanding Bell to turn over to the trustee the alleged excessive charges collected by Bell from its customers for the ten-year retroactive period.[4]

The holdings in Getto I and Getto II:

Getto I:

In 77 Ill. 2d 346 (October '79, rehrg dend. 11/79), the Illinois Supreme Court held:

> —Plaintiff, as a representative customer of Bell, had standing to challenge the so-called "additional charge" for the City's message tax because the "additional charge" was not an additional charge for utility service *qua* service, but was reimbursement to Bell for the City's message tax and compensation for its accounting/collecting fee of 3%. (77 Ill. 2d at 356).

---

[4] Upon return of the mandate in *Getto I* Bell filed objections to plaintiff's series of motions. In the course of those objections Bell stated to the circuit court:

> "In candor, the interests of justice require that, to the extent that fairness permits, the subscriber should be entitled to a reasonable refund of the excessive tax collected." (Supp. App. 14)

Bell proposed that the refund be conducted by the state utility regulatory agency rather than the court-appointed trustee. That suggestion was rejected by the circuit and supreme courts of the State (*Getto II,* 86 Ill. 2d at 53).

—The inclusion of the City's message tax in the tax base on which the same message tax is calculated (i.e., the "tax on itself", was erroneous, and unauthorized by the state statute and the city ordinance. (77 Ill. 2d at 359).

Getto II:

In 86 Ill. 2d 39, (rehrg denied 11/81), the state supreme court held that it was within the discretion of the circuit court to define and certify the class, including the ten-year retroactive period, but that the class definition could be amended or modified before "a *final* judgment", citing *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478. (86 Ill. 2d at 47)

—Retroactive claims against the fund would not be barred by any "voluntary tax payment doctrine" urged by Bell, because the petitioner failed to disclose material facts in reference to the MUT in its billings to telephone customers. (86 Ill. 2d at 49-50)

—As a matter of state law the defenses of estoppel, waiver, and laches were not valid defenses in the instant circumstances. (86 Ill. 2d at 51-53)

—The circuit court did not err or abuse its discretion in ordering Bell to deposit the amounts of its overcharges with the trustee, notwithstanding Bell's contention that it already remitted those tax moneys to the city. The court said:

> "Since the plaintiffs *paid excess charges directly to Bell,* we consider that the court did not abuse discretion in ordering Bell to deposit the amounts of overcharges with the trustee excepting those excess charges already deposited with the trustee by the City pursuant to the court order. *This order did not represent any determination of liability by the circuit court.*" (86 Ill. 2d at 55). (Emphasis added).

REASONS WHY THE WRIT SHOULD BE DENIED.

1. Neither the decision below nor the record raises the Question Presented in the Petition. The narrow issue is the propriety of the chancellor's turn-over order in the light of the history of the litigation. That order, after a strong showing of ultimate success on the merits as reflected in the findings of the preliminary injunction and other evidence in the record, directed petitioner to turn over to the court-appointed trustee the sum of $11,500,000 —estimated by Bell itself as the approximate overcharges to its Chicago customers for the ten-year period in the class definition.

(a) The turn-over order is nothing more than a measure *pendente lite* to sequester, preserve and protect the fund (augmenting the special protest fund previously created and turned over to the trustee) until a *final* adjudication of liability. Petitioner distorts the issue as if the order was a pre-judgment attachment without notice or due process under this Court's decisions in *North Georgia Finishing Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), and other cases which have invalidated "summary creditor" remedies.

(b) The instant case does not remotely resemble *North Georgia Finishing, Inc.* or its related cases, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), cited by petitioner. In *North Georgia Finishing* the Court struck down a Georgia garnishment statute which permitted impounding of a bank account without "notice or opportunity for an early hearing and *without participation of a judicial officer.*" (419 U.S.

601 at p. 606). Similarly in *Fuentes* the Court held invalid replevin statutes of Florida and Pennsylvania which permitted a secured installment seller *ex parte* to repossess the goods sold "without notice or hearing and *without judicial order or supervision.*" (419 U.S. at 606) (Emphasis added). But see *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, sustaining a Louisiana sequestration statute.

(c) In the case at hand the turn-over order followed *numerous hearings* in the circuit court on the issue of a preliminary and permanent injunction and conclusive evidence—which the utility cannot genuinely dispute—that in the past it had overcharged its customers for the Chicago tax on itself. Petitioner has admitted that in fact a refund for the overcharges was due and proposed its own program for a refund.

(d) The Supreme Court in *Getto II* expressly noted:

> "The preliminary injunction issued by the court granted prospective relief only and did not require, *as did the permanent injunction issued after Getto I* that excess payments since July 18, 1967 be deposited by Bell in the protest fund." (Emphasis added).

(e) In *Getto II* the Illinois Supreme Court, although sustaining the trial court's definition of the class, expressly declared:

> "As of this stage of the action here, no final order or determination of liability has been made. The proceeding is at the discovery stage. As further evidence is presented, the court, in its discretion, may decide to amend or revise its determination of the class." (86 Ill. 2d 48).

(f) The Supreme Court also declared:

> "Bell argues that, since it has already remitted those tax moneys to the city, this court should order that the city and not Bell is responsible for all excess payments, including those made beginning in July 1967. That obviously would be improper. No determination has been made as to liability for overcharges. *Since the plaintiffs paid excess charges directly to Bell, we consider that the court did not abuse discretion in ordering Bell to deposit the amounts of overcharges with the trustee, excepting those excess charges already deposited with the trustee by the city to the court's order. This order did not represent any determination of liability by the circuit court.*" (86 Ill. 2d at 55).

(g) Petitioner's right to trial is expressly vouchsafed by the Supreme Court on any issues left in the case. The claim of violation of due process is made on the basis that the trial court has not heard evidence on petitioner's "liability"—even though Bell has admitted *past* overcharges to its customers for the city's message tax. But Bell's purported defenses of "voluntary payment", "laches", "estoppel" and "waiver", were held unavailing as a matter of law, and these issues are now res judicata.

2. The interlocutory order should not be reversed or set aside absent a showing that the chancellor abused his discretion, which showing is not made in the instant case.

3. The turn-over order of which petitioner complains, was within the firmly settled powers of a court of equity, especially one endeavoring to protect the interests of a large class of absent plaintiffs. The turn-over order may be analogized to the issuance of an injunction or to the appointment of a receiver:

(a) The instant turn over order, was entered after the preliminary injunction was made permanent. Bell

never sought review of the permanent injunction. Since an injunction is an extraordinary remedy it may not issue unless "there is a probability of ultimate success on the merits of the plaintiff's claim." The familiar test is stated in *Banks* v. *Trainor*, 525 F. 2d 837, 841 (7th Cir. 1975):

> "The appropriateness of granting a preliminary injunction depends upon a balancing of several factors, including likelihood of success on the merits, the lack of an adequate remedy at law, the prospect of irreparable harm if an injunction is not issued and a comparison of the relative hardships imposed on the parties; no one factor is determinative and the District Court should be flexible and is given discretion to fashion suitable temporary relief."

(b) In the instant case the class action complaint has been litigated vigorously since 1977. Issuance of the preliminary injunction and its affirmance by the Illinois Supreme Court demonstrated a strong probability of ultimate success on the merits. The likelihood of ultimate success is also crowned by the permanent injunction and petitioner's judicial admissions in the proceedings below: "the interests of justice require that . . . a subscriber should be entitled to a reasonable refund of the excessive tax collected." The turnover order is an interlocutory provision to protect the fund until a final disposition of the merits and resolution of any cross claims *inter se* Bell and the City.

(c) The instant turn over was not predicated simply upon a "debtor-creditor relationship" between the utility and its customer. The complaint has alleged fraud on a fiduciary relationship between Bell and its customers with respect to the collection of the MUT, namely that petitioner's customers had a right to rely

upon accurate and full disclosure with respect to the "additional charge" made.[5]

4. The instant turn over may be compared to a receivership *pendente lite* where a sequestered fund is placed under the control of a court-appointed and supervised receiver.

In 4 Pomeroy, *Equity Jurisprudence* (5th Ed. 1941) it is stated in Sec. 1330:

> "A receiver is a person standing indifferent between parties, appointed by the court as a quasi officer or representative of the court, to hold, manage, control, and deal with the property which is the subject matter of or involved in the controversy, under the direction of the court during the continuance of the litigation."

(a) In language pertinent to the instant case, Pomeroy states in Sec. 1331:

> "One of the most material circumstances, without which the court would hardly make the appointment, is the reasonable probability that the plaintiff asking for a receivership will ultimately succeed in obtaining the general relief sought by his suit."

---

[5] The circuit judge granting the preliminary injunction observed that "the vice in the application of the ordinance is that it was stated to be a 5% tax passed on to the Bell customer, when as applied, it is in fact a 6.56% tax passed on to the Bell customer. Assuming the good faith and purity of motives of the City and Bell, the practice here complained of results in an *unwholesome bald deception* of Bell's subscribers." (R. 107, 109).

See also *Reynolds Holding Co.* v. *El Paso Electric Co.*, 70 SW 2d 624, 627 and the later appeal of the same case in 100 SW 2d 97, 101-102 (Texas Civil Appeals): "From these and other authorities it clearly appears, we think, that public service corporations owe absolute fidelity to their customers and, this being true, the customers have a right to rely upon representations made by them".

(b) Echoing the familiar chancery doctrine the Supreme Court of Illinois stated in *Chicago Title & Trust Co.* v. *Mack*, 47 Ill. 480 (1932) at p. 483:

"The appointment of a receiver is a branch of equity jurisdiction not dependent upon any statute and rests largely in the discretion of the appointing court. It had its origin in the English court of chancery at an early date, and it was incidental to and in aid of the jurisdiction of equity to enable it to accomplish, as far as practicable, complete justice among the parties before it, the object being to secure and preserve the property or thing in controversy *for the benefit of all concerned* pending the litigation, so that it might be subjected to such order or decree as the court might make or render." (Emphasis added).

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

LEONARD E. HANDMACHER
134 North LaSalle Street
Chicago, Illinois 60602
(312) 332-4442
Attorneys for Respondent

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1645

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner,

v.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *et al.*,
Respondents.

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

HOWARD J. TRIENENS*
DAVID W. CARPENTER
ELLEN M. BABBITT
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JAMES R. BRYANT, JR.
MICHAEL J. KARSON
ILLINOIS BELL
TELEPHONE COMPANY
225 W. Randolph
Chicago, Illinois 60606
(312) 727-3746

Attorneys for Petitioner

ROBERT D. ALLEN
THOMAS P. HESTER
Of Counsel

* Counsel of Record

No. 81-1645

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner,

v.

CHARLES A. GETTO, individually and on behalf of all persons similarly situated, *et al.*,
Respondents.

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Respondent's Brief In Opposition ("Opposition") is an elaborate attempt to divert this Court's attention from the question presented in this case by misstating its procedural history and making a series of irrelevant arguments. These claims are so spurious that they vividly demonstrate that the Illinois Supreme Court has decided a question of great national importance in a manner that is flatly contrary to the decisions of this Court.[1]

The question presented in this case is whether, as the Illinois Supreme Court held, a state chancery court can

[1] The statement required by Rule 28.1 appears at p. ii of the Petition For A Writ Of Certiorari.

constitutionally have "discretion" to order Illinois Bell, a class action defendant, to pay approximately $11,000,000 into a court administered fund, pending final judgment, even though there had not been—and could not be—a preliminary determination (1) that *Illinois Bell* could be liable to the class for this amount, which represents the excessive tax payments received and retained by the City of Chicago and which the Circuit Court held "unjustly enriched" the *City*, not Illinois Bell, or (2) that this sequestration order could conceivably be required to protect the class's probable ability to collect any judgment that might be entered against Illinois Bell.

The Opposition's principal argument appears to be that the question raised in the petition and decided by the Illinois Supreme Court is somehow not before this Court. Specifically, respondents baldly assert both in the restatement of the question presented (Opposition, p. i) and in statements scattered throughout the Opposition (*e.g.*, pp. 7-10) that the Illinois courts in fact have held that Illinois Bell is probably liable to the class for the excessive tax payments paid to the City and that Illinois Bell has even admitted its liability to the class for these amounts. These contentions are simply nonsense. They, first, are flatly inconsistent with the Illinois Supreme Court's opinion, which makes it explicit that "[*n*]*o determination whatever* has been made as to liability for overcharges." App. 14a (emphasis added). Second, they are contradicted by the Circuit Court's decision in *Getto I*. Not only did the Court not hold that Illinois Bell is liable to the class for the excessive tax payments, but the Court stated explicitly that the *City*, not *Illinois Bell*, had been "unjustly enriched" by the excessive

tax payments. App. 55a, Finding 11.[2] Third, they are contrary to Illinois Bell's position throughout this litigation that if anyone is liable to the class for the excessive tax payments, it is the City, and the City alone.[3]

Finally, the Opposition seems to contend (pp. 7-8) that whether or not there is any basis for a prejudgment sequestration order in law or in fact, the order will always satisfy the Due Process Clause if it is entered by a judicial officer. This claim is flatly inconsistent with this Court's repeated holdings that a defendant may not be deprived of substantial assets pending a trial unless the court makes specific determinations relating to the defendant's probable liability and the need for prejudgment sequestration to assure the plaintiff's probable ability to collect any judgment against that defendant. See Petition for Certiorari, pp. 10-13. The fact that the respondents can make such an argument and that the Illinois Supreme Court could accept it vividly demonstrates why the Petition for a Writ of Certiorari should be granted and the Illinois Supreme Court's decision reversed.

---

[2] As the Dissent recognized, because Illinois Bell "has admittedly paid to the city all of the collected taxes," the decision compelling Illinois Bell "to pay into the fund the amount of tax previously remitted to the city" is "totally unjustified" and poses "substantial due process problems." App. 18a.

[3] Following the decision in *Getto I*, Illinois Bell recognized that some kind of a refund order might be appropriate. However, contrary to the Opposition (p. 10), Illinois Bell's position, then and now, is that the City alone is liable for any refund of the excessive tax payment because the City retained these monies.

CONCLUSION

For the reasons stated in this Reply Brief as well as those in the Petition for a Writ of Certiorari, the decision of the Illinois Supreme Court should be summarily reversed. In the alternative, the Petition for a Writ of Certiorari should be granted and the case set for oral argument.

Respectfully submitted,

HOWARD J. TRIENENS*
DAVID W. CARPENTER
ELLEN M. BABBITT
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JAMES R. BRYANT, JR.
MICHAEL J. KARSON
ILLINOIS BELL
TELEPHONE COMPANY
225 W. Randolph
Chicago, Illinois 60606
(312) 727-3746

Attorneys for Petitioner

ROBERT D. ALLEN
THOMAS P. HESTER
Of Counsel

April 15, 1982.

---

* Counsel of Record